UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

In re:	:	Case No. 10-BK-31607
GARLOCK SEALING TECHNOLOGIES, LLC, *et al.*,	:	Chapter 11
Debtors.[1]	:	Jointly Administered

TRIAL BRIEF OF THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS FOR ESTIMATION OF PENDING AND FUTURE MESOTHELIOMA CLAIMS

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[1] The Debtors are Garlock Sealing Technologies LLC, Garrison Litigation Management Group, Ltd., and The Anchor Packing Company. As used herein, "**Garlock**" refers to Garlock Sealing Technologies LLC and Garrison Litigation Management Group, Ltd.

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PRELIMINARY STATEMENT

The Court is poised to begin the long-awaited trial for aggregate estimation of pending and future mesothelioma claims against Garlock arising from its sales of asbestos-containing gaskets and packing. *See* Order for Estimation of Mesothelioma Claims, dated Apr.13, 2012 [Dkt. No. 2102] (cited below as "**Est. Order**"). The Official Committee of Asbestos Personal Injury Claimants (the "**Committee**") respectfully submits this brief as a preview of major issues to be joined at trial, the legal framework for considering those issues, and the major themes of the Committee's evidentiary presentation. With all the relevant briefing and debate the Court has already entertained on these subjects, and with the parties having agreed that post-trial briefing will be helpful, conciseness, rather than comprehensiveness, will be our goal in this submission.

The centerpiece of the trial will be the analyses and estimates of the opposing experts: Dr. Mark A. Peterson for the Committee, Dr. Francine F. Rabinovitz for the legal representative of future claimants (the "**FCR**"), and Dr. Charles E. Bates for Garlock. These experts offer the following as their preferred estimates (in millions of dollars, net present value as of the petition date):

	Pending	Future	Total
Dr. Bates	< $25	< $100	< $125
Dr. Rabinovitz	$230	$1,042	$1,292[2]
Dr. Peterson	$210	$1,055	$1,265

[2] In her estimate, Dr. Rabinovitz includes projected costs of defense. Dr. Peterson has not done so at this stage, but recognizes that when the Court turns to a solvency analysis, defense costs will need to be taken into account.

Drs. Peterson and Rabinovitz use variations of an established methodology employed in every asbestos estimation ever decided by a court and widely used in the ordinary course by defendants and their consultants (including Garlock and Dr. Bates prepetition), issuers of financial statements, trusts, and insurance companies. Their analyses differ in certain epidemiological assumptions and other details, but both are grounded in Garlock's claim resolution history. Dr. Bates' approach, by contrast, was just recently unveiled in *In re Specialty Products Holding Corp.*, 2013 WL 2177694, at *18 (Bankr. D. Del. May 20, 2013) ("***Bondex***"),[3] where Judge Fitzgerald rejected it in favor of the established method. Judge Fitzgerald observed that Bondex used the established methodology in its prepetition financial reporting, rather than the approach Bates White developed for the bankruptcy estimation. *See id.* at *10-11. Likewise, in Garlock's case, Dr. Bates' novel approach bears no relationship to Garlock's experience. In its last several years before bankruptcy, Garlock paid settlements and judgments on mesothelioma claims in the following amounts (in millions of dollars): 2006 − $72.5; 2007 – $59.0; 2008 – $71.5; 2009 – $70.8; 2010 (five months) − $35.0. Dr. Bates purportedly considers 3,932 pending claims, and his forecast of future ones extends through the year 2059. Yet, he calculates that Garlock's total future indemnity payments to mesothelioma victims will be less than what Garlock actually paid in any two years between 2006 and 2010.

Dr. Bates' estimate flows from unrealistic assumptions and an unreliable methodology designed, as Judge Fitzgerald put it, to "minimize [the debtor's] liability." *Bondex*, 2013 WL

[3] Dr. Bates acknowledges that the methodology his firm used in *Bondex* is the same one he uses in this case.

2177694, at *4.[4] Notably, in forecasts he prepared between 2005 and 2010 of Garlock's asbestos liability for the financial disclosures of its ultimate parent, EnPro Industries, Inc. ("**EnPro**"), Dr. Bates used a variation of the methodology that Drs. Peterson and Rabinovitz use. Dr. Bates also used the established methodology in every contested estimation where he has offered an opinion until this case and *Bondex*. In those settings, therefore, Dr. Bates and his clients all assumed – as realism dictated – that the defendant would settle many cases and try few. Here, though, he puts forth at Garlock's direction an estimate based on the assumption that Garlock and other parties responsible for asbestos products would try all pending and future mesothelioma claims to conclusion. They never did so, and never will. Garlock's own witnesses readily concede that any attempt to try all such claims would be economic suicide.

Garlock and Dr. Bates criticize the opposing experts for using the standard methodology now that it no longer suits their purposes. Their criticisms are unfounded, as the evidence at trial will show, but their purposes should be kept clearly in mind. Garlock and its expert are intent on using bankruptcy to ratchet down Garlock's liability to tort victims so as to salvage the interest of Coltec Industries, Inc. ("**Coltec**"), Garlock's stockholder and co-litigant here. That mission explains why Garlock has instructed Dr. Bates to estimate what Garlock would owe for mesothelioma claims in an imaginary world of its own liking, rather than replicating the values of those claims as they have actually been determined. Under authoritative precedent and basic principles of bankruptcy law, however, it would be illegitimate to allow a debtor to use

[4] The Committee reserves the right to move to strike Dr. Bates' opinion and exclude his testimony on the basis that his methodology is unreliable. Garlock has moved for such relief as to Drs. Peterson and Rabinovitz, as well as certain industrial hygiene and medical experts listed by the Committee, and has noticed its motions for the first day of trial. The Committee anticipates that the Court will hear all of the experts and reserve challenges to the admissibility of their opinions for post-trial briefing and rulings, as any court has ample discretion to do in a bench trial.

estimation as a weapon for reducing tort liability. Rather, estimation must approximate the worth of the tort claims as they would be valued outside of bankruptcy, using the best information and analyses available, without pretense of mathematical exactitude, and with due regard for the paramount interests of creditors. That should be the purpose of the upcoming trial.

DISCUSSION

I. WHAT IS TO BE ESTIMATED

A. The Court's Order Calls for Estimation of Allowable Mesothelioma Claims

The Court has set out to make "a reliable and reasonable estimate of the aggregate amount of money that Garlock will require to satisfy present and future mesothelioma claims." Est. Order at 5, ¶ 10. Because state law governs the validity and value of the claims, and because bankruptcy is not meant to confer windfalls on tortfeasors,[5] the Court must "look at how a claim would have been valued in the state court system had the debtor never entered bankruptcy." *In re Armstrong World Indus.*, 348 B.R. 111, 123 (D. Del. 2006) (citing *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 722 (D. Del. 2005)); *see also In re Eagle-Picher Indus., Inc.*, 189 B.R. 681, 683 (Bankr. S.D. Ohio 1995). Thus, in *Bondex*, Judge Fitzgerald declared that "[i]n estimation proceedings the Court is to determine that number [*i.e.*, the debtor's aggregate liability] based on the Debtor's tort system claiming history." *Bondex*, 2013 WL 2177694, at *1 (citing *Owens Corning*, 322 B.R. at 721-22).

This Court has stated that it is undertaking an estimation "for allowance purposes pursuant to section 502(c)," (Est. Order at 5, ¶ 9), but only in a general sense: "The court does

[5] *See Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000) ("The 'basic federal rule' in bankruptcy is that state law governs the substance of claims, Congress having 'generally left the determination of property rights in the assets of a bankrupt's estate to state law.'") (citations omitted) (quoting *Butner v. United States*, 440 U.S. 48, 54, 57 (1979)); *see also Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450–51 (2007) (same).

not expect to 'allow' any individual or group of claims. Rather, it proposes to estimate the aggregate amount necessary to satisfy present and future claims that may be allowed at some later point in the case." Est. Order at 5, ¶ 11. This goal comports with precedent. "[A]n estimation of asbestos liability for the limited purposes of plan formulation is a fruitful endeavor because it promotes the speed and efficiency goals of the Bankruptcy Code, while not implicating the procedural rights of the individual claimants." *In re Federal-Mogul Global Inc.*, 330 B.R. 133, 154–55 (D. Del. 2005). It also has important implications for what is relevant, and in particular calls into question why large amounts of trial time should be devoted to an exploration of scientific disputes, much litigated in the tort system, concerning the causation of mesothelioma. The Court has made clear that it does not intend to decide in the estimation, for example, whether chrysotile causes that disease. This limitation is entirely appropriate, as the chrysotile "defense" and other "science" issues Garlock tenders implicate fact-intensive disputes and cannot properly be adjudicated except in an actual tort suit between a plaintiff and a defendant where both sides must face a jury. *See* 28 U.S.C. § 1411(a) (preserving in bankruptcy claimants' right to jury trial of personal injury tort and wrongful death claims).[6]

The target of the estimate, then, is the combined value of allowable mesothelioma claims against Garlock, pending and future. Claims are allowable unless "unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1). All mesothelioma claims that would be paid if Garlock were not bankrupt are allowable and must be included in

[6] The Court chose estimation after considering and rejecting Garlock's motion to commence actual allowance proceedings. It rejected that motion on the ground that allowance contests would entail litigation on a massive scale, trigger the due-process rights of thousands of individual claimants, and strain the resources of the Bankruptcy Court and the District Court. Hr'g Tr. 1295:16-18, Nov. 19, 2010.

the estimate. Garlock has set up a purported distinction between valuing the claims for its "Legal Liability," on the one hand, and quantifying what it would cost to resolve them, on the other hand. It contends that gaskets cannot cause mesothelioma. Garlock takes the position, which Dr. Bates sets out to vindicate, that at most a tiny fraction of the dollars Garlock has paid over the years to satisfy claims for that disease represents any genuine liability and that what drives even its largest settlements is defense costs, multiplied, it claims, by the tactics of a few plaintiffs' law firms. The facts and data will not bear out these far-fetched contentions.

B. Basic Standards for Assessing the Evidence

The Court has stated its intention to "hear such evidence as is appropriate relating to each approach in estimation and will make its decision based upon which is the more persuasive." Est. Order at 8, ¶ 19. What the evidence will show, we submit, is that Garlock's "Legal Liability" concept is specious. Dr. Bates' estimate has no foundation in reality. Even if it were relevant to differentiate Garlock's "true liability" from the total amounts paid – which it is not – Dr. Bates' analysis purporting to do so is meaningless.

Because this is a bankruptcy proceeding, not a "trial" of present and future asbestos claims, the principles that should inform the Court emerge from the jurisprudence of estimation in bankruptcy and also – because the estimation here pits the interests of stockholders against those of creditors – from the fundamental policy of the Absolute Priority Rule. To begin with, the estimation must be grounded in reality. In an asbestos bankruptcy, this means that the debtor's actual claims experience and resolution history provide the essential resource for estimation. Furthermore, Garlock must be held to a high burden of persuasion in its effort to escape that history and minimize the estimate with a view to salvaging the interest of its parent companies at the expense of creditors. In this Chapter 11 case, after all, Garlock is attempting to

cap its tort liability by obtaining a discharge from thousands of pending claims and an extraordinary injunction that would not only channel future claims to a limited-fund trust, but also insulate its direct and indirect parents from derivative responsibility for Garlock's torts.

Estimation is a form of valuation, and under bankruptcy law, valuation must be "based in reality." *In re Coated Sale Inc.*, 144 B.R. 663, 668 (Bankr. S.D.N.Y. 1992) (asset valuation). The seminal case is *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510 (1941), which addressed the valuation of a business based on its earnings capacity. The Supreme Court emphasized that, while the valuation was necessarily an estimation, it should be as realistic as possible: "[T]hat estimate must be based on an informed judgment which embraces all facts relevant to future earning capacity and hence to present worth, including, of course, the nature and condition of the properties, the past earnings record, and all circumstances which indicate whether or not that record is a reliable criterion of future performance." *Id*. at 526.

By the same token, estimates of liability must be realistic. Just as an estimate of future earnings capacity must consider the past earnings record, *see Consolidated Rock*, 312 U.S. at 526, a realistic estimate of the value of pending and future asbestos claims must consider the value of similar claims resolved in the past. Given that settlements overwhelmingly predominate in Garlock's past handling of mesothelioma claims, ignoring that history would be to "[close] one's eyes to the realities that existed [prior to the bankruptcy filing]." *In re Babcock & Wilcox Co.*, 274 B.R. 230, 256 (Bankr. E.D. La. 2002). *See Federal-Mogul*, 330 B.R. at 157, citing *Eagle-Picher*, 189 B.R. at 686.

Using Garlock's long history of resolving cases, mostly by settlement, permits the Court to base its estimate on the reality of the market. Significantly, in applying the Absolute Priority Rule, the Supreme Court has expressed a distinct preference for market valuation. *Bank of Am.*

Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 457-58 (1999) (considering the so-called "new value" exception to the Absolute Priority Rule, without deciding whether such an exception exists). Here, where Garlock's parents, Coltec and EnPro, are seeking to retain direct and indirect equity interests, the litigation-driven opinion of Garlock's expert as to the value of mesothelioma claims that potentially render Garlock insolvent cannot substitute for the market values reflected in the historical claims data. Liabilities, like assets, are best valued in the marketplace. "The market is just that, a market; as such, it would not be prudent to second-guess the historic resolutions that were driven by factors by *both* plaintiffs and defendants . . . ." *Federal-Mogul*, 330 B.R. at 162 (emphasis by the court). Thus, fundamental bankruptcy law under which creditors have priority over equity holders requires the Court to receive with skepticism an expert opinion that purports to override the market in claims resolution by substituting unrealistic assumptions that tamp down the estimate.

"[A]n estimation by definition is an approximation." *Federal-Mogul*, 330 B.R. at 155. Especially where valuation requires "a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made." *Consolidated Rock*, 312 U.S. at 526. *See Owens Corning*, 322 B.R. at 725 ("mathematical precision cannot be achieved"). In other words, the risk of miscalculation is inherent in estimation. But, in a valuation of liabilities where the interests of stockholders are pitted against those of creditors, that risk should be borne by the debtors' shareholders, rather than its creditors, whose rights are superior, and who are entitled to be paid in full before shareholders may retain any interest. Congress enacted the Absolute Priority Rule in 11 U.S.C. § 1129(b) to meet "the danger inherent in any reorganization plan proposed by a debtor, then and now, that the plan will simply turn out to be too good a deal for the debtor's owners," and to ensure that debtors and insiders cannot

"use the reorganization process to gain an unfair advantage." *Bank of Am. Nat. Trust & Sav. Ass'n*, 526 U.S. at 444 (citing H.R. Doc No. 93-137, pt. I, p. 255 (1973)). And, as the Supreme Court has instructed, "[w]hether a company is solvent or insolvent . . . 'any arrangement of the parties by which the subordinate rights and interest of the stockholders are attempted to be secured at the expense of the prior rights' of creditors 'comes within judicial denunciation.'" *Consolidated Rock*, 312 U.S. at 527 (citations omitted).

C. The Court Should Waste No Time Estimating Under Garlock's Unconfirmable Plan

Separate and apart from this "Legal Liability" estimate, Dr. Bates offers a second forecast on a different subject, namely, his prediction of what Garlock would pay claimants if the plan of reorganization it filed in November 2011 were confirmed. That estimate is irrelevant.[7] The task now is to measure the overall liability that Garlock must deal with in order to reorganize. How creditors' entitlements might be adjusted under a viable plan of reorganization commanding creditor support is an issue that may arise at a later stage but is not now presented. Garlock's plan is manifestly unconfirmable,[8] and will not garner the support of the creditor constituency. The Court itself immediately identified Garlock's plan as a sham that has no prospect of being confirmed. Hr'g Tr. 10-11, Jan. 26, 2012. There is no point in spending time at trial on Dr. Bates' estimate of what Garlock's liability would be in the Neverland of its unconfirmable plan.

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[7] *See Eagle-Picher*, 189 B.R. at 683 (noting that the goal of estimation in an asbestos bankruptcy should be to estimate the aggregate amount of the asbestos claims in the tort system, not "the value which claimants might take in satisfaction of their claims through some bankruptcy mechanism such as a trust of the sort provided for at § 524(g)").

[8] *See* Objection of the Official Committee of Asbestos Personal Injury Claimants to the Debtors' Proposed Disclosure Statement, dated Jan. 19, 2012 [Dkt. No. 1808].

II. THE COMMITTEE'S AFFIRMATIVE CASE

Every aggregate estimation made heretofore by a court presiding over an asbestos bankruptcy has recognized that a reliable estimate must focus on the debtor's "historical claims-handling practices, and expert testimony on trends and developments in the asbestos tort system." *In re Federal-Mogul Global, Inc.*, 330 B.R. 133, 155 (D. Del. 2005). That is how Dr. Peterson, the Committee's expert, has developed his estimate, and the Committee's presentation of other expert opinions and fact testimony at trial provide foundation for that estimate and rebut Garlock and Coltec's criticisms of it. Dr. Bates, on the other hand, is pursuing here the same approach his firm unveiled in *Bondex*, while purporting to adapt it to Garlock's circumstances.

A. The Standard Methodology Employed by Dr. Peterson

The epidemic of asbestos disease spawned mass tort litigation that began in the late 1960s. Garlock has been an asbestos defendant from a very early date, a consequence of its sale of asbestos-laden gaskets used widely in shipyards and industrial settings where millions of workers came into contact with them. The incidence of mesothelioma, a disease linked inseparably with asbestos, combined with the proliferation of claims for that disease, has generated a rich fund of data for the valuation of pending and future claims. A valuation methodology tailored to these unique aspects of the asbestos litigation phenomenon has gained widespread acceptance over more than twenty years. In essence, it is a "comparables" approach to valuation. The methodology proceeds from the common-sense premise that nothing is more similar to pending and future claims than past ones. It brings to bear forecasts of the incidence of mesothelioma and the defendant's claims data to forecast in a reasonable way the number and timing of claims the defendant will receive and resolve, and the overall dollar amount it will pay as indemnity to claimants.

Dr. Peterson adheres to this standard approach and has applied it here to estimate the aggregate value of pending and future mesothelioma claims against Garlock at the petition date.[9] He uses the epidemiological forecast published by Dr. William J. Nicholson, extended to cover a greater span of years than the original study. That forecast is strongly corroborated by empirical data gathered annually by the United States government and serves as a key tool for estimation: It makes it possible to understand what portion of previous victims of mesothelioma have sought compensation from Garlock and also to predict what portion of the population diagnosed with mesothelioma in the future will probably do likewise. Garlock's own claims data supplies essential statistics as to the number, timing, and disposition of past mesothelioma claims, from which reasonable assumptions can be developed for predicting the number and value of comparable future claims.

The analysis begins with pending claims. Using the claims database ("**Garrison Database**") maintained by Garrison Litigation Management, Ltd. ("**Garrison**"), Garlock's in-house claims management affiliate, Dr. Peterson (i) calculates the total number of pending mesothelioma claims; (ii) calculates the percentage of claims Garlock is likely to settle and pay, taking account of the extent to which Garlock was able to dismiss mesothelioma claims without payment during a relevant "calibration period" in the past; (iii) computes the average amount that Garlock paid per settled claim over the selected base period; and (iv) multiplies the claims likely to be settled by the corresponding average settlement value, to arrive at the aggregate liability for pending claims.

[9] "[C]laims are to be valued as of the petition date." *Owens Corning*, 322 B.R. at 722 (citing *In re Brints Cotton Mktg.*, 737 F.2d 1338 (5th Cir. 1984)).

The estimation of *future* asbestos claims of course involves forecasting occurrences and events that cannot be known with certainty. A reasonable estimate of future mesothelioma claims can be developed, however, by certain well-understood steps, which for simplicity may be summarized as follows:

- Using the Nicholson epidemiology as extended, plot out how many people are expected to be diagnosed with mesothelioma on a year-by-year basis over the coming decades.

- Compute what portion of those so diagnosed will sue Garlock. This metric, known as the "propensity to sue," is calculated by dividing the number of mesothelioma claims Garlock received in a calibration period by the overall number of persons so diagnosed in the period.

- Derive reasonable assumptions about what percentage of future claims will be paid in each year of the forecast. This rate of payment is determined by reference to what percentage of mesothelioma claims Garlock resolved by payment during a relevant span of past years and, conversely, what percentage of claims it was able to dismiss without payment.

- Develop a baseline assumption as to the average amount Garlock will pay per compensated claim in the future, based on historical data from a relevant period.

- By multiplying the baseline average payment amount times the number of forecasted claims to be paid in future years, project the stream of those payments on a year-by-year basis, in nominal dollar terms, across the entire period of the forecast.

- Adjust the nominal payment stream to account for monetary inflation over time.

- Translate the inflation-adjusted stream of future payments to its present value as of the petition date to account for the time value of money.

An aggregate estimation is not a mechanical extrapolation from past to future. Inevitably, the calculations involved call for the exercise of judgment in certain respects. For example, determining the "propensity to sue," the payment rate, and the average payment amount require the analyst to make a judgment as to what period of the debtor's history is most

relevant for calibrating the forecast of future claims and resolutions. By calculating those statistics year-by-year during such a calibration period, the analyst can identify trends bearing on what the debtor's claims and resolution experience will likely be in the future. Thus, just as an appraiser who sets out to value a business based on its future earning capacity should consider "all circumstances which indicate whether or not [the past earnings] record is a reliable criterion of future performance," *Consolidated Rock*, 312 U.S. at 526, so an analyst making an aggregate estimation of mesothelioma claims should consider whether assumptions derived from past experience require adjustment when projected into the future, so as to account for material trends and developments that are demonstrably at work in the tort system with measurable effects. *See Owens Corning*, 322 B.R. at 723 (noting that some past results had been "skewed by factors which can and should be avoided in the future," and considering "the extent to which adjustments should be made to historical values to account for these probable changes").

By the same token, estimation is not an exercise in wishful thinking or unbridled speculation. For example, Garlock cannot fairly discount its settlement values from the decade of the 2000s based on the alleged strength of its scientific defenses, since those defenses were available and known to it when it negotiated those settlements and that information was thus "baked in" to the values agreed to in those resolutions. *See Federal-Mogul*, 330 B.R. at 161-62 (finding that adjustments to the forecast were unnecessary because the relevant factors were already reflected in the settlement history).

B. The Evidentiary Record Will Corroborate the Reasonableness of Dr. Peterson's Key Assumptions

The Committee will present at trial expert and lay testimony, as well as documentary evidence, to put Dr. Peterson's estimate in the context of Garlock's long history in asbestos litigation. The evidence will show:

- the nature and variety of Garlock's asbestos-containing products, the high concentration of asbestos that they contained, and their conspicuous branding (which made them much easier than most asbestos products for workers to identify);

- the dangerous levels of asbestos fibers to which workers were exposed in normal uses of those products, namely, the cutting of new gaskets and the removal of old ones;

- the legal theories employed by claimants in suing Garlock for compensation;

- the defenses typically raised by Garlock, and the nature and sources of information available to Garlock to develop those defenses;

- Garlock's approach to managing the claims, the heart of which was the systematic avoidance of risk by a variety of arrangements forged with key plaintiffs' counsel to settle claims supported by a diagnosis of mesothelioma and evidence that the injured person worked with or around Garlock's asbestos products, coupled with the dismissal without payment of claims lacking such support;

- the prevalence of group settlements in Garlock's resolution history, the criteria applied in such arrangements, and the limited information needed to administer them;

- key information, statistics, and metrics, including average resolution values, derived from the Garrison Database, which shows the impact of mesothelioma claims on the company despite its considerable success in managing the consequences through hard bargaining and intelligent management.

The overall import of this evidence will be to substantiate Garlock's claim and resolution history from the decade of the 2000s, especially the period 2006-2010, as the best foundation for the aggregate estimation. The key fact witnesses on this subject will be in-house counsel from

Garrison, Garlock, and EnPro, certain of Garlock's outside defense attorneys, and plaintiffs' lawyers who brought and resolved mesothelioma claims against Garlock.

C. Certain Criticisms of the Peterson Estimate and Why They Fall Short

Many issues divide the parties in the estimation, and it would be unproductive to try to recount them all here. Some key examples, though, will convey the types of issues that will be joined at trial.

1. Settlements Establish Consensual Payment Obligations and, Because They Are Garlock's Usual Means of Resolving Claims, Must Stand as the Principal Basis for Aggregate Estimation

The most basic disagreement is Garlock's insistence that its actual resolution history does not show "Legal Liability." This contrived notion will not withstand scrutiny. It is a fancy way of saying that a tortfeasor wants to use bankruptcy as a "do-over" when its protestations of blamelessness did not prevail in the tort system. But Garlock's re-defined concept of liability cannot gloss over that a defendant has just two ways of resolving a tort claim: It can try the case to conclusion. Or it can pay money to settle the claim if it cannot be disposed of without payment for lack of evidence. Garlock used both means, but consensual resolutions overwhelmingly predominate throughout its long history facing mesothelioma claims. It tried a tiny percentage of such claims. It procured voluntary dismissals without payment where claimants could not supply both a diagnosis of mesothelioma and evidence that the injured person worked with or around Garlock's asbestos-containing products. And where such evidence was provided – as it was in most cases – Garlock generally paid to settle the claims. Indeed, by it own admission, Garlock only proceeded to trial when it could not obtain a settlement demand that it considered reasonable. EnPro Indus., Form 10-K at 25 (Mar. 3, 2004). Furthermore, it entered into group settlements covering large numbers of claims in order to

hedge the risks it would run in forcing cases to trial. EnPro's public disclosures acknowledged that, in view of "the threat of large verdicts . . . it is likely that Garlock will continue to enter into settlements that involve large numbers of cases from time to time . . . ." EnPro Indus., Form 10-K at 37 (Mar. 7, 2006).

By settling most viable claims, Garlock accomplished important goals of economy and risk management. It curtailed defense costs. It also traded away the uncertain outcomes and potential judgment debts that juries and courts might impose notwithstanding its defenses, accepting in exchange settlement obligations fixed by its own agreements. As an integral part of these exchanges, Garlock hedged the risk that any particular claim that it regarded as defensible might turn out to be the basis for a catastrophic verdict. These benefits and trade-offs are all implicit in the agreed prices of its settlements.

Under its usual *modus operandi*, then, Garlock converted large numbers of mesothelioma suits from disputed, unliquidated tort claims to enforceable contractual payment obligations. To ignore those obligations for estimation purposes, as Garlock urges, would be to blind oneself to how the claims are "priced" under the circumstances in which Garlock has actually confronted them and would continue to confront them were it not in bankruptcy. Garlock's many settlements give rise to enforceable legal liability just as surely as do its few judgments. It bears emphasis that the statute this Court has invoked calls for the estimation, not of Garlock's self-defined "Legal Liability," but of "contingent or unliquidated claim[s]." 11 U.S.C. § 502(c). For allowance, settlement obligations have no lesser status than final judgments – and the same must be true for aggregate estimation. It would be folly to set aside Garlock's actual resolution history when formulating the estimate, when the only realistic assumption is that settlement is the

process by which most of the pending and future claims would be resolved if Garlock were not bankrupt.

2. The Questionnaires Provide No Appropriate Basis for Excluding Pending Claims from the Estimate

Dr. Peterson has not used for his estimate responses to the Questionnaire or Supplemental Questionnaires that Garlock issued in this case. The responses are not a necessary or probative source in comparison to the data Garlock accumulated in the ordinary course of the litigation. Dr. Bates faults him for this, but these criticisms are misplaced.

Dr. Bates criticizes Dr. Peterson for not reducing his count of pending mesothelioma claims on the basis of Questionnaire responses. The Questionnaires went only to persons listed in the Garrison Database as holding open mesothelioma claims. For his own estimate, Dr. Bates excludes claimants whose responses indicate that their disease is not mesothelioma, that their claims have already been settled, or that their claims are being withdrawn. These exclusions might be appropriate if we were valuing individual claims. In the aggregate estimation, however, they make accurate statistical analysis more difficult, not less so. The reasons why are technical, having to do with the way statistics are shaped by the pace at which information emerges and is recorded in the ordinary course of the underlying cases and with the fact that, to be meaningful, a valuation must speak as of a specific date.

In the years leading up to its bankruptcy, 2006-2010, Garlock dismissed without payment about 42% of the mesothelioma claims it received. If the automatic stay were not in effect and the litigation were unfolding in the usual way, Garrison would be correcting the recorded disease categories of claims and noting in its database the closing of claims with or without payment, all in the ordinary course and at the natural pace of the underlying litigation. When applied to the

entire set of pending claims, under reasonable assumptions as to the timing of dispositions, the historically-derived dismissal rate reliably captures such events.

The automatic stay halted the flow of information from claimants to Garrison. The Questionnaire process later abruptly restarted that flow, but only in part and in a one-sided way. For instance, the Questionnaires made no effort to determine what mesothelioma claims might have been filed against Garlock without having been noted in the Garrison Database at all, a known practical limitation on all databases generated in mass tort litigation.

The misreporting of disease categories in the Garrison Database cuts both ways. Comparing the May 2011 version of the Garrison Database that Dr. Bates relies upon to available editions of the database as it existed at earlier dates reveals a phenomenon that analysts of asbestos litigation find in virtually all instances: among the many asbestos claims recorded by a defendant as ones for lung cancer, asbestosis, nonmalignant conditions, or unknown disease, some percentage will turn out to be claims for mesothelioma. In the ordinary course, the defendant's database will be updated and some claims will "migrate" into the mesothelioma category, while other claims will fall out of that category. The two tendencies tend to cancel one another out, although the net effect is often to *increase* the number of pending mesothelioma claims. Dr. Bates concerns himself only with one side of these double-edged phenomena – the side that tends to reduce the estimate – which introduces serious bias. From the statistical point of view, it is more conservative and reliable to ignore the "migration" of claims between disease categories and treat the database as a snapshot rather than a moving picture. The alternative is to undertake a systematic analysis of the transitions by which claims belatedly enter the database and move from one category to another within the database, but Dr. Bates does nothing of the sort.

Dr. Bates also criticizes Dr. Peterson for including in his estimate claims that Garlock characterizes as making no specific assertion that the injured person had direct or indirect contact with Garlock's products – that is, as lacking product identification evidence. Dr. Bates assumes that a claimant who had no such evidence when he answered the Questionnaire will never obtain that necessary proof in the future. But the assumption is false. This Court has already recognized that discovery and investigation had not been completed for many claims when Garlock filed for bankruptcy,[10] and expressly ruled that claimants and their counsel need not engage in trial preparation to answer the Questionnaire and need not seek out evidence beyond that already associated with their existing file in the matter.[11] Dr. Bates himself acknowledges that claimants usually do not know all the asbestos-containing products to which they were exposed. And when the Questionnaires descended upon the claimants, their claims were in various random states of preparation. Most of the mesothelioma victims who were living at the petition date will have died by the time the Questionnaires came out. Because few mesothelioma claims are ever tried, an even fewer number will have been trial-ready at that arbitrary moment.

[10] *See* Order Granting in Part and Denying in Part the Debtors' Motion for an Order Compelling Mesothelioma Claimants to Comply with this Court's Questionnaire Order and Overruling Objections to the Questionnaire at 4, ¶ 5, dated Mar. 16, 2012 [Dkt. No. 2036] ("If an individual . . . does not have any information responsive to Parts 5A or 5B of the Questionnaire that has not already been provided, he or she shall expressly so state in writing . . . *provided, however,* that the individual may qualify any such statement by an assertion or objection along the lines that discovery and investigation with respect to his or her claim against the Debtors has not been completed.").

[11] *See* Order with Respect to Debtors' Challenges to Supplemental Questionnaire Objections and Deficiencies, at 2-3,¶ 3.d, dated Aug. 27, 2012 [Dkt. No. 2476], ¶ 3.d ("[I]t suffices for a claimant to respond to the Supplemental Exposure Questionnaire based on the extent to which his or her underlying mesothelioma claim has already been prepared. For example, in response to Question 2.d, a claimant need disclose only those products that are known personally to the claimant or the Injured Person as sources of the Injured Person's asbestos exposures, or that have been ascertained as such through evidence counsel has already assembled in the file on the claimant's claim. No one is required to speculate or to conduct any further investigation of a claim for purposes of responding to the Supplemental Exposure Questionnaire.").

This is especially true of claims destined to settle in groups, the dominant pattern in Garlock's resolution history. For all of these reasons, Garlock cannot fairly treat Questionnaire responses as the equivalent of fully worked-up claims, and Dr. Peterson would have been wrong if he had done so.

3. Garlock's Revisionist Account of Its Settlement History Is Misleading, and Gives No Valid Basis for Lowering the Estimate

"Garlock contends that the settlement approach [to estimation] overstates its liability because it (a) includes settlements (even of invalid claims) motivated by defense costs; and (b) was inflated by the exit from the tort system of a number of large asbestos defendants." Estimation Order at 7, ¶ 16. It laments the passage of the 1980s and 1990s when, by Garlock's account, it was no more than a "peripheral" defendant who was able to look on at trial as plaintiffs offered their proofs against "Top Tier" defendants, makers of friable insulation products, and then obtain defense verdicts based on arguments that it was the insulation, not Garlock's gaskets, that caused the plaintiffs' disease. When those it deems "Top Tier" defendants went bankrupt, Garlock became a trial target and was placed at unfair disadvantage, so it says, because claimants were no longer forthcoming about their exposures to insulation products. According to Garlock, the consequence was a drastic run-up in its defense costs, as Garlock undertook costly efforts to ferret out evidence of such other exposures, leading it to pay hundreds of millions of dollars in settlements even though its products caused no injuries.

This story is the major thrust of Garlock's attack on its settlement history as a proper foundation for estimation. It is an artful fiction. In reality, those whom Garlock labels as "Top Tier" defendants were once "peripheral" defendants themselves. In earlier stages in the evolution of asbestos litigation, they, like Garlock, had enjoyed the opportunity to piggyback on

the defense efforts of other defendants who then figured more prominently in the discovery taken and cases made by plaintiffs' counsel. When those earlier "lead" defendants went bankrupt in several "waves" over the 1980s and 1990s,[12] Garlock's "Top Tier" defendants faced demands to pay more in settlements, by way of picking up the "shares" of the bankrupts under doctrines of joint and several liability, just as Garlock met with such demands in the 2000s. And they, too, confronted plaintiffs' lawyers newly focused on developing cases against them, creating the concomitant need for these defendants to invest much more in their own defense, just as Garlock says it was forced to do.

The bankruptcy of Johns-Manville, the biggest of all asbestos defendants, exemplifies this pattern, but is by no means the only instance of it. When Johns-Manville filed bankruptcy in 1982, a group of co-defendants moved the bankruptcy court to extend the automatic stay nationwide to bring all asbestos litigation against anyone to a halt. Their main argument was that, because Johns-Manville had been leading the defense, bearing the brunt of defense costs, and paying most of the settlement dollars, it would be an unfair distortion, highly prejudicial to co-defendants, to allow the litigation to continue in Manville's absence.[13] Garlock was one of these movants.[14]

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[12] The following "lead" defendants, and many lesser ones, filed for bankruptcy protection in the 1980s and 1990s: Johns-Manville Corp. (1982); UNR Industries (1982); Raymark Corp./Raytech Corp. (1989); Celotex Corp. / Carey Canada, Inc. (1990); National Gypsum (1990); Eagle-Picher Indus. (1991); and Keene Corp. (1993).

[13] *See* Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 9, *In re Johns-Manville Corp.*, No. 82 B 11656-82 B 11676 (Bankr. S.D.N.Y. Oct. 28, 1982); Plaintiffs' Statement Under Southern District Civil Rule 3(g) in Support of Motion for Summary Judgment, *In re Johns-Manville Corp.*, No. 82 B 11656-82 B 11676 (Bankr. S.D.N.Y. Oct. 29, 1982) (attached as **Exs. A and B**).

[14] The bankruptcy court of course denied the motion. *See In re Johns-Manville Corp.*, 26 B.R. 405 (Bankr. S.D.N.Y. 1983), *aff'd*, 40 B.R. 219 (S.D.N.Y. 1984).

Thirty years later, Garlock is still complaining that the bankruptcy of other defendants deprived it of shelter, made it a prime target, and forced it to put on a costly defense. Much as Garlock and its co-defendants argued, in effect, that all detrimental consequences of Johns-Manville's bankruptcy should have been borne by the plaintiffs, so Garlock insists that it should not have had to suffer burdens traceable to the "Bankruptcy Wave" of the "Top Tier." Its main argument against using its resolution history from the decade of the 2000s as a guide to estimation boils down to a complaint about the supposed unfairness of that plight.

4. Garlock Has Never Lacked the Information Needed to Defend Itself

The notion that Garlock was not aware of, and could not prove, plaintiffs' other exposures in litigation in the 2000s is false. Garlock had the same means available to plaintiffs' counsel to investigate such matters. The reality is that few mesothelioma claimants – dying workers or their survivors – know all, or even most, of the asbestos products to which they were exposed when their diagnoses are made after decades-long latency periods.[15] Dr. Bates admits this. Of necessity, then, the key tool for investigation of such facts has always been the injured person's work history, as detailed in Social Security records or similar documents routinely produced by claimants in the litigation. Product identification then becomes a matter of (1) interviewing or deposing the claimant as to the jobsites where the injured person worked, the kinds of work he did there, the varieties and activities of workers in the same places, and (2) developing evidence as to what asbestos products were present at those job sites and likely to have been encountered by the injured person, given the nature of the work performed there. The usual documentary sources of evidence are sales invoices, bills of lading, and supply records

[15] In contrast to insulation products, Garlock's gaskets were conspicuously branded with its name and logo, making them one of the easier asbestos sources for workers to remember and identify.

documenting the receipt and use of asbestos products at work sites and, most important, the testimony accumulated over decades of litigation about asbestos claims emerging from the same worksites. In some key jurisdictions, transcripts of such testimony are kept on file in repositories available to all parties. Garlock's own defense counsel maintained databases of such information. Everywhere, Garlock had equal, or better, access to such sources of proof than did plaintiffs' counsel.

The evidence did not disappear when the "Top Tier" defendants went bankrupt. Naturally, claimants then focused their own proof on defendants who could still be sued. If, however, Garlock wished to show alternative exposure sources to support arguments going to causation or to try to lay off liability on the bankrupt entities, it retained all the tools needed to develop its proof. Garlock had every opportunity to conduct discovery of parties and third parties, but most often chose not to do so, preferring to focus on its alleged scientific defenses in those few cases that were prepared for trial, or – far more often – to settle its cases without incurring the expense of discovery. That discovery and trial preparation are costly is true for plaintiffs and defendants alike and provides no reason to discount claim values in estimation.

The creation of trusts in the reorganization of the bankrupts inflicted no disadvantage on Garlock. In individual tort suits, such trusts have always been amenable to subpoenas for a claimant's evidentiary submissions,[16] if defendants wished to search beyond the discovery

[16] It is *wholesale* discovery of trust claims databases, or broad swathes of information going beyond the needs of parties in a given tort suit, that the trusts have resisted, and properly so. As limited funds charged with conserving their resources for the compensation of tort victims, trusts have an interest in not allowing themselves to be ensnared in litigation or subjected to large-scale discovery expeditions by other entities with their own agendas. Nor are their databases public utilities. Instead, the trusts stand in the shoes of former defendants who exited the litigation because their liabilities outstripped their ability to pay, and have interests similar to those of solvent defendants in maintaining the confidentiality of their settlement data. Although this Court eventually saw fit to permit Garlock to subpoena limited data from *(Footnote continued on next page.)*

obtainable from the plaintiffs themselves. The idea that trusts should be "transparent" is a shibboleth that solvent defendants, and Garlock, find politically expedient to promote with legislators these days. They have recently persuaded the Ohio and Oklahoma legislatures to enact statutes that compel claimants to develop all trust claims before proceeding to trial against solvent defendants. This radical assault on traditional litigation norms, however, is not the law in most places. By and large, it remains true that the plaintiff is master of his case, and thus may decide what claims to pursue and when to pursue them. A fuller answer to the distortions touted by proponents of "trust transparency reforms" has recently been published by the Committee's lead law firm and it is attached as **Exhibit C**. Mealey's Asbestos Bankruptcy Report: Commentary, The Effrontery of the Asbestos Trust Transparency Legislation Efforts, Vol. 12, Iss. 7 (Feb. 2013).

In any event, as trusts emerged from the asbestos bankruptcies of the 2000s, Garlock could determine what eligible claimants stood to collect in settlement from those trusts far more easily and cheaply than it ever could garner such information from solvent co-defendants. In the tort system, under procedures followed in most jurisdictions, settlement amounts paid by co-defendants were disclosed to Garlock only if it took a verdict. Since trials were rare, and since Garlock won many of them, it rarely obtained such disclosures. Asbestos trusts, by contrast, publish their court-approved Trust Distribution Procedures ("**TDP**"), which set forth their Payment Percentages (the percentage that their limited resources permit them to pay against the

(Footnote continued from previous page.)
trusts operated through the Delaware Claims Processing Facility for particular defined needs asserted by Garlock in this proceeding, the Court has also recognized that settlement information is not available for the mere asking from third parties, but rather "is protected by those parties and subject to confidentiality agreements" and "is generally and traditionally held secret." Order Denying Motion for Production of Information from Counsel Representing Garlock Claimants at 2, ¶ 2, dated Mar. 4, 2011 [Dkt. No. 1201].

liquidated value of an accepted claim), and their scheduled values for each recognized type of asbestos disease (*i.e.*, their liquidated values assigned for claims that have been qualified by expedited review), their "maximum values" (*i.e.*, the most they will pay for an extraordinary claim), and their "average values (*i.e.*, the liquidated values they aim to achieve across the aggregate of all accepted claims, under individual review as well as the more routine expedited review).

Many trusts also publish approved site and occupation lists, based on evidence amassed by their predecessors during their years in asbestos litigation. These documents are published and available on websites maintained by the trusts. They identify work places where their predecessors' products are acknowledged to have been present and job functions that are known to have routinely brought workers into contact with those products. Claimants can use these lists to qualify for payments from the trusts in appropriate circumstances. (Unlike litigating tort defendants, the trusts do not force upon claimants the expensive exercise of proving exposure facts for which the trusts already have ample proof.) Based on studying a claimant's work history and the information made public by the trusts, litigating defendants can readily inform themselves of what trust recoveries may be anticipated for a given claimant. Indeed, Bates White has developed a line of business using trusts' TDPs to create precisely these kinds of analyses.

Given these realities, the instances of discovery misconduct that Garlock claims to have ferreted out in its depositions of several plaintiffs' law firms in this case will not bear the weight Garlock places on them. The "Major Expense Authorization" documents Garlock has been compelled to produce about those cases, pursuant to this Court's finding that Garlock has waived privileges in that regard, provide a window on the real reasons why Garlock negotiated

settlements with those plaintiffs' law firms and paid the prices it did. Claimants' "other exposures" had little to do with it.

Dr. Bates proposes that if the Court accepts Dr. Peterson's estimation approach, it should nevertheless discount that estimate by $350 million to reflect what Garlock hopes will be the greater availability of trust information in the future. That is a bold leap, given the abundance of such information that was already available when Garlock priced settlements in the latter half of the 2000s. No such discount can be justified by the data Garlock obtained from the Delaware Claims Processing Facility, nor do any other existing facts support it. The absence of evidence that trust payments have put downward pressure on settlement values is not surprising, given that the median Payment Percentage applied by the trusts is only 25% of their scheduled values, which values reflect the historical settlement payments of their predecessor tortfeasors.[17]

A debtor cannot hypothesize future changes in the law as a way of reducing its liability estimate. No one can predict whether the asbestos defendants' long-standing efforts to procure "trust transparency" and tort "reform" will ever succeed. Any suggestion that the asbestos claims against Garlock should be estimated on the basis of rosy scenarios of how the law may change in the future would invite impermissible speculation, as Judge Newsome sternly held when an expert offered a low estimate in the *Armstrong* bankruptcy on the assumption that a bill then being debated in Congress would be enacted and transform the entire system for compensating asbestos victims: "I don't think there is such a thing as a sear (phonetic) (*sic*, seer) as far as legislation goes." Transcript at 16, *In re Armstrong World Indus., Inc.*, No. 00-04471 (Bankr. D. Del. Nov. 18, 2003) (**Ex. D**). "It would be bad enough if she were testifying as to

[17] U.S. Gov't Accountability Office, GAO-11-819, Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts at 21 (September 23, 2011).

what the law contains. That everybody knows you can't do. But this is even worse. She is now going to tell me what a proposed piece of legislation contains which is not even a law yet . . . . I think this is totally beyond the pale." *Id.* at 25.

In the tort system Garlock actually operated in, and would be operating in still but for its bankruptcy, the only way for a defendant to realize benefits from others' settlements is to suffer a verdict and then (1) obtain credits against the verdict, under the nuances of local procedure, for payments made to the plaintiff by settling defendants, or (2) pursue other responsible parties for contribution. But since Garlock rarely tried cases, it almost never had occasion to avail itself of either settlement credits or contribution. When Garlock settled with mesothelioma claimants, as it most often did, it shut the door on these remedies. Settling defendants are not entitled to contribution.[18]

5. Bates White Argues for Discount Rates that Treat Asbestos Claimants as Financial Risk Takers, Rather than as Involuntary Tort Creditors, and Would Thereby Diminish the Estimate Unfairly and in a Manner Contrary to Law

A technical but significant aspect of the estimation is the selection of the discount rate to apply in calculating the present value of the stream of future payments Garlock would make to mesothelioma victims if it were not bankrupt. The discount is necessary in order to recognize the time value of money: the dollar that will be paid out in 2059 is worth less now than the dollar paid next year. But the obligations in question here are not speculative securities, purchasers of which accept risk in exchange for a high return on their money. Instead, they are

[18] Unif. Contribution Among Tortfeasors Act § 1(d) ("A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.").

projected payments to tort victims, involuntary creditors to whom, under the assumptions of the estimate, will be entitled to compensation in amounts fixed either by agreement or judgment. It would be unfair and inappropriate to apply a discount rate that would layer risk on top of time value. For this reason, the law requires the use of a risk-free rate in the discounting computation. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 538 (1983); Commodities and Securities Exchange, 17 CFR § 211.

Financial analysts recognize obligations of the United States Treasury as free of risk. Accordingly, the risk-free rate is the yield the market demands on Treasury obligations with maturities corresponding to the dates when the assets or liabilities being valued are expected to be converted into cash. Here, the series of projected payments to extinguish tort claims may be aggregated as annual outflows, giving effect to an inflation factor.[19] Market data permit an analyst to match each projected annual payment to the yield on a Treasury security that will mature just as the payment is assumed to be due. Dr. Peterson has obtained those yields from an investment banker, Kenneth W. McGraw, who in turn has gleaned them from published market data. Given the timing of payments in the projected stream, the applicable series of yields translates to a discount factor of about 3.3%.

Dr. Bates claims to recognize that the discount must be at a risk-free rate. By resorting to a long-term average, rather than identifying the relevant specific yields matching the payment stream, he arrives at a rate of 5.58%, which is much higher than is appropriate. Furthermore, one of his colleagues, Dr. Snow, has submitted a rebuttal report contending that the discount should be made at the rate of Garlock's "weighted average cost of capital" or on the average yields

[19] Drs. Peterson and Bates both use an inflation factor of 2.5%, an assumption commonly applied by financial analysts.

earned by pension funds. Whereas the whole idea of a risk-free rate is to exclude all adjustments other than that required to recognize the time value of money, the rates Dr. Snow argues for import significant credit risks and business risks, effectively treating the involuntary tort creditors as speculators who are angling for a high rate of return. Thus, while paying lip service to the imperative of a risk-free rate in Dr. Bates' work, when it comes to critiquing Dr. Peterson's forecast, Bates White urges the Court to apply a high *risk-laden* rate. By Bates White's calculations, doing so would reduce Dr. Peterson's estimate by $180 million. The position taken by Garlock's experts flies in the face of the law and results in substantial understatement of the aggregate estimate.

IV. THE COMMITTEE'S REBUTTAL OF GARLOCK'S CASE

Garlock takes the position that, since it does not "admit" liability for any mesothelioma claim, no such claim can be allowable unless it is translated into a final judgment by actual litigation or into a "virtual" judgment by estimation. What Garlock means by "Legal Liability" is the amount its expert calculates Garlock would owe under these and other heavy-handed assumptions that bear no relationship to the way Garlock (or any other defendant) has ever handled mesothelioma claims in the real world. Not surprisingly, the defined amount resulting from Dr. Bates' calculations is a small fraction of what Garlock would pay under the conditions that actually apply. That is the entire purpose of Garlock's "Legal Liability" conceit.

Apart from Dr. Bates, Garlock evidently plans a long and detailed evidentiary presentation of the same "science" defenses it would put on if it were trying a mesothelioma case to a jury. This will involve a parade of experts to opine on such disputed matters of science as the carcinogenic potency of chrysotile compared to other forms of asbestos and the extent of the

fiber exposures needed to account for the causation of mesothelioma. Garlock's witness list names 14 experts on science topics. Dr. Bates' estimate relies on just one of them.

A. Dr. Bates' Fanciful Methodology for Minimizing Garlock's Estimated Liability

Dr. Bates describes his new methodology as one that applies an economic model of damage recovery. He asserts that his estimate results from twelve steps; conceptually, it seems, his steps are meant to be taken for each claim included in the estimate. The steps he describes are as follows:

- Estimate the damages a plaintiff would win if he obtained a verdict against all defendants.
- Estimate the plaintiff's economic loss as a predicate for applying rules that, in some states, treat such losses differently than noneconomic losses for purposes of apportioning liability among joint tortfeasors.
- Estimate the plaintiff's recoveries to be received from defendants other than Garlock and from trusts.
- Estimate the plaintiff's and the defendants' costs of trial.
- Estimate the likelihood that the plaintiff would win his liability case against Garlock, based on a sample of closed claims and Questionnaire materials.
- Identify the liability apportionment rules of the 50 states and the District of Columbia, relying on a memorandum supplied by Garlock's counsel, the Robinson firm.
- Estimate the number of liable co-defendants and trusts for typical Garlock claimants, by reference to a review of discovery materials from 900 closed claims, discovery and Questionnaire materials for 350 open claims, and bankruptcy voting records.
- Apply the economic model of damage recovery using parameters established by the previous steps.
- Estimate the future incidence of mesothelioma attributed to occupational exposure using Bates White's own epidemiological model, which differs significantly from Nicholson's (and from anyone else's) in assuming that about one-third of mesotheliomas are *not* caused by occupational exposures to asbestos but are "idiopathic," that is, of unknown origin.

- Estimate the number of future incidences of mesothelioma among persons whose job history would indicate that they could have worked with or around Garlock's asbestos-containing products, and so may be "candidates" for asserting claims against Garlock.

- Apply the economic model, with parameters defined by previous steps, to estimate the liability arising from future mesothelioma diagnoses among the candidate-claimants, and apply an inflation factor to express the liability in nominal dollar terms.

- Discount the nominal liability to present value.

A problem the parties and the Court will encounter in considering Dr. Bates' approach is that his report is not fully explanatory and the backup data produced with the report is extensive and difficult to work with. Dr. Peterson's firm, however, has succeeded in replicating the key calculations in Bates White's work. There is much less to it than meets the eye.

B. Dr. Bates' Counter-Factual Assumptions and Glib Conclusions

The problems with Dr. Bates' approach, both in theory and in application, are myriad. In this brief, the Committee will discuss just a few of the major flaws, saving a full exposition for the trial.

1. The Impossibility of Dr. Bates' Imagined Trials

At Garlock's request, Dr. Bates assumes that all claimants who can allege direct or indirect contact with Garlock's asbestos-containing products will proceed to trial and final judgment. As discussed above, this premise flouts reality. Dr. Bates has explained in deposition, moreover, that the scenario posited is not just that claimants will try their cases against Garlock, but that they will do so against all defendants who might be responsible for their injuries. No defendant would settle. Any verdict would be apportioned among all of them. And Dr. Bates' estimate of Garlock's aggregate liability pursuant to the notional verdicts reflects that all

defendants would pay an equal share, even though more than 60% of them would be trusts that stand in for insolvent defendants!

No court has ever held a trial at which each potential asbestos exposure was accounted for by a defendant present in the courtroom. Dr. Bates counts 3,932 pending mesothelioma claims and assumes that about 2,163 of them (55%) have triable cases. Adding those to his forecast of 16,800 "candidates" with exposures sufficient to bring new mesothelioma claims against Garlock through the year 2059, Dr. Bates' analysis posits almost 19,000 trials. At his assumed cost to Garlock of $500,000 per trial, the scenario implies costs of $9.5 billion. If each trial took only five days – a drastically low estimate for a trial aimed at determining claims against scores of defendants – the trials would consume 95,000 days of court time. The scenario is obviously impossible. Even if Dr. Bates means it as a tool for analysis, rather than as a prediction of future behavior in the real world, the approach violates the imperative that estimation be realistic.

2. Dr. Bates' Skewed Prediction of Claimants' Success Rate at Trial

Dr. Bates predicts that just 8.3% of the claimants proceeding to trial would win verdicts against Garlock. He derives this prediction from Garlock's self-reported won/lost rate in trials held before 2001, on the ground that trial outcomes achieved before the bankruptcies of the 2000s were based on more complete evidence of plaintiffs' asbestos exposures than was available in later trials.

There are many problems with this analysis. To begin with, Dr. Bates' assumption is skewed because it ignores the more recent trials. As one consequence of the bankruptcy of many defendants, plaintiffs' lawyers were led to develop better evidence against the remaining solvent defendants. Notably, in the early 2000s, plaintiffs' lawyers and experts (including Dr. Longo,

who will testify for the Committee at trial) developed techniques for demonstrating to juries that degraded gaskets throw off much larger quantities of asbestos fiber when removed by wire-brushing and scraping than had previously been shown. Thus, by looking to trial results from before 2001 as the basis for predicting claimants' trial-success rate, Dr. Bates conveniently ignores a key fact with obvious implications for its liability, namely, that the cases presented against Garlock at trial grew stronger in the years that followed. If his assumption were based instead on all mesothelioma cases Garlock tried to verdict in the twenty years before its bankruptcy, the claimants' success rate would be 24%, as Dr. Bates himself computes it.

But there is a deeper problem, one that tends to make nonsense out of Dr. Bates' entire project of quantifying what Garlock's liability would be if trial were the usual mode of resolution, instead of a very rare and indeed anomalous one. The fact is that cases tried to verdict are *not representative* of the population of claims from which they are drawn. Garlock's own experts admit this. Cases that wind up in trial are selected in a process by which well-managed defendants like Garlock weed out the cases they perceive as most dangerous and proceed to trial only in cases that they perceive to be weak and that, for whatever reason, elude disposition by more predictable means. Plaintiffs, too, engage in such a process from the opposite point of view. That mutual selection process, of course, is settlement, and it ensures that the rare case not resolved consensually will differ in ways that matter from the run-of-the-mill cases that are settled. To take inherently unrepresentative cases as the clay for molding an estimate is deeply problematic if realism is the test, as it must be.

Indeed, the selection process operates even at trial, when parties settle after opening to the jury. Garlock itself did so fairly often, despite the costs sunk in preparing for trial, which

shows the distortions implicit in any suggestion that Garlock settled just to avoid defense costs or that its verdict record accurately represents its "true liability."

3. Dr. Bates' Deeply Flawed Regression Analysis for Predicting Verdict Amounts

Dr. Bates employs a regression analysis to predict what damages juries would award each claimant. His regression analysis for pending claims uses just three variables, namely, the claimant's age, whether he was living or dead when the claim was filed, and the state of filing. Dr. Bates posits that these variables alone suffice to "explain" the jury awards rendered in 367 cases about which Dr. Bates has gathered very limited information. Indeed, when predicting future awards, Dr. Bates uses the claimant's age as the *only* variable. On this meager foundation, Dr. Bates presumes to predict claim-by-claim awards. But his data are much too sparse to capture all potentially explanatory factors at work in the complex and intractable workings of juries. As a result, Dr. Bates' predictions are no more reliable than ones we would arrive at by writing numbers on slips of paper and pulling some of them out of a hat. A trial lawyer who purported to foretell trial outcomes in the way Dr. Bates is doing would soon find himself without clients willing to trust him to try their cases.[20]

Dr. Bates' prediction of verdict amounts implies that mesothelioma victims' total damages on pending and future claims will come to $ 107 *billion*. By his various steps, assumptions, and calculations, Dr. Bates whittles down Garlock's supposed "share" of that sum until it amounts to just 0.1% of the total. In real trials, there is no conceivable way for Garlock

[20] Dr. Bates also maintains that claimants' ages enable him to say what portion of a settlement payment was paid merely to avoid greater defense costs and what portion represents "true liability." This is nonsense, as will be shown at trial. There certainly is no reason to believe that lawyers settling cases on behalf of dead or dying victims have ever valued the components of settlement payments in the way that Dr. Bates supposes.

to diminish its liability to anything approaching that degree; indeed, in a state applying joint and several liability, Garlock's "Legal Liability" to successful plaintiffs would be 100% of the damages, minus only settlement payments already collected. Dr. Bates' approach is indeed designed to "minimize their liability," *Bondex,* 2013 WL 2177694, at *4.

4. Dr. Bates Cannot Divide Settlement Payments Into "True Liability" and "Defense Costs"

Dr. Bates maintains that claimants' ages enable him to determine what portion of a settlement payment was paid merely to avoid greater defense costs and what portion represents "true liability." This is nonsense, as will be shown at trial. Judge Fitzgerald in *Bondex* rejected, as "theoretical and untested," the notion that defense costs could be separated out "as a component of settlement that would reduce Debtors' 'several share' of asbestos payments." *Bondex,* 2013 WL 2177694, at *18. There certainly is no reason to believe that lawyers settling cases on behalf of dead or dying victims have ever valued the components of settlement payments in the way that Dr. Bates supposes. As Judge Fitzgerald recognized, "settlements are not unilateral deals . . . . it cannot be rationally doubted that the [] settlement places a value on the claim that both parties accept. Otherwise, there would be no settlement." *Id.* at *19.

5. Dr. Bates' Untested Epidemiology

For predicting the future incidence of mesothelioma, Dr. Bates uses purported "enhancements" of Nicholson's 1982 epidemiological forecasts. Whereas the Nicholson study has been confirmed by thirty years' worth of empirical data accumulated since its publication, Dr. Bates relies on his own proprietary epidemiological model that has never been peer-reviewed, published, or validated. Its main impact is to categorize roughly one-third of forecasted incidences of mesothelioma as unrelated to occupational exposure to asbestos. In this

way, Dr. Bates reduces by a third the population from which future mesothelioma claimants against Garlock will emerge.

Asbestos defendants promote this notion of "idiopathic" mesothelioma as a matter of their self-interest in litigation, but the idea is controversial at best among qualified epidemiologists. Dr. Bates compounds the effects of his biased assumption by predicting at other stages of his analysis that many claimants will fail to prove causation against Garlock. Presumably, the group whose proof of causation fell short would include claimants whose disease was "idiopathic," if there were any validity to Dr. Bates' assumption. Thus, Dr. Bates is not only making a dubious epidemiological assumption, he is also double-counting to reduce his forecast.

6. Dr. Bates Eliminates Claimants from His Forecast for Unfounded Reasons that Show a Failure to Understand the Tort Litigation and Seriously Bias His Estimate

In discussing above some of Dr. Bates' criticisms of Dr. Peterson's estimate, we have noted that Dr. Bates looks beyond the Garrison Database for the purpose of reducing his count of pending mesothelioma claims, but, despite having ample means at his disposal, does nothing to analyze the extent to which pending mesothelioma claims have not been recorded as such in the database. He also insists that claimants whose Questionnaire materials Garlock's coders deem lacking in indicia of exposures to Garlock's products will never develop the product identification evidence necessary to present a triable case. That assumption alone eliminates 45% of the pending claims and 41% of the potential forecasted ones. These assumptions misuse the Garrison Database and the Questionnaires and ignore the realities shaping how and when viable claims are prepared. *See* Section II.C.2 above.

7. Dr. Bates' Calculation that a Plaintiff's Verdict Would Be Apportioned Among 36 Defendants Proceeds from False Assumptions About Bankruptcy Ballots and Trust Claims

In Dr. Bates' effort to minimize Garlock's estimated liability, the final stroke is his calculation that the typical claimant who won a verdict from Garlock would also collect from 35 other co-defendants and trusts. He rests this conclusion on a sample of discovery materials gathered from 900 closed cases and 350 Questionnaire responses, and also on the vast trove of ballots cast on plans of reorganization that Garlock obtained from ballot agents in other cases. The calculation assumes that (i) every ballot cast by a Garlock claimant in other defendants' bankruptcies and every claim submitted to trusts – including trust claims that have not been paid – amount to "admissions" by the claimant that he has proof of exposure to the asbestos-containing products for which such debtor and trusts are liable, (ii) any claimant who proves liability against Garlock will also succeed in establishing the liability of the debtors and trusts to which his ballots and claims, respectively, were submitted, and (iii) that each such entities can and will pay a full "share" of the verdict.

This is a gross distortion. Leaving aside whether the reviewers who pored over closed claims and Questionnaire materials fairly interpreted their contents, Dr. Bates' treatment of each ballot and trust claim as a surrogate for a share of liability cannot be squared with a fair-minded understanding of what those documents mean. Most ballots in asbestos cases expressly state that they do not constitute claims. A plaintiffs' lawyer representing a mesothelioma victim may reasonably cast a ballot for that client on an asbestos debtor's reorganization plan unless the lawyer's information positively *rules out* any basis for an eventual claim. Considering that many trusts *presume* exposures and pay claims on the basis of approved work sites and occupations, the mere filing of a claim with a trust does not constitute an assertion, let alone an "admission,"

that the claimant or the lawyer possesses evidence specifically linking the claimant to any particular asbestos product. More to the point, many trust claims languish unpaid, for failure to satisfy the trusts' criteria for payment. Dr. Bates knows this from the DCPF data provided to him in this case, and from his own experience in asbestos bankruptcy matters, and the evidence at trial will bear it out. In estimating on the basis that all ballots will mature into trust claims and all such claims will be accepted and paid, Dr. Bates is not merely making a mistake; he is embracing misleading premises prescribed for him by Garlock's counsel.

C. Garlock's "Science" Evidence is Largely Irrelevant

Garlock's "scientific" defenses provide no basis to reduce the estimate of Garlock's asbestos liability. Those defenses, boiled down to their essence, are that no mesothelioma claims asserted against Garlock plaintiffs are "medically or scientifically valid" based on Garlock's experts' long-held opinions that chrysotile asbestos cannot cause mesothelioma except at extraordinarily high levels of exposure, and that the amount and type of chrysotile asbestos exposures from gasket work cannot possibly be high enough to cause or contribute to causing mesothelioma.

Almost all of Garlock's medical and science experts were regularly retained by Garlock and other asbestos defendants in mesothelioma cases and most are regularly proffered by other gasket or chrysotile product defendants to testify to the same opinions they offer here. Their opinions were and are hotly disputed by plaintiffs' experts in every case, as they will be by the Committee's experts here.

For example, as the evidence will show, the opinion that chrysotile does not cause mesothelioma in humans except in extraordinary circumstances is contradicted by substantial evidence, including over a dozen epidemiology studies conducted all over the world showing an

increased risk of mesothelioma in cohorts of people exposed to chrysotile asbestos, as well as case series and analytical epidemiology studies supporting the view that a few days of chrysotile exposure by itself can cause mesothelioma, that exposure to asbestos fibers from gaskets can cause mesothelioma, and that in an exposure setting mixing different kinds of asbestos fibers there is no scientifically valid way to exclude chrysotile exposure as contributing to the causation. Indeed, the debate over the hazards of chrysotile asbestos takes place only in courtrooms. In the real world, every scientific agency that has ever studied the question has concluded that chrysotile causes mesothelioma, there is no safe level of exposure to it, and asbestos-containing gaskets are dangerous products if protective measures are not taken to reduce or eliminate exposures from working with them. In addition, Garlock's assertion that asbestos exposures from gasket work are negligible and not significantly higher than background ambient air is contradicted by many studies, and by numerous measurements of asbestos exposure from gaskets done by industry in the real world, not to defend themselves in litigation, but simply to understand what happens when gaskets are damaged significantly during removal activities.

The medical and scientific disputes at the center of every Garlock mesothelioma case were well-known to lawyers on both sides, and were taken into account when they decided whether and at what price to settle cases. Thus, the strengths and weaknesses of these defenses are already "baked in" to the settlement values, and no adjustments to the estimation to account for those defenses is necessary. *See Federal-Mogul*, 330 B.R. at 161-62.

Expert testimony on Garlock's "science" defenses therefore is largely irrelevant to this estimation proceeding. However, to give the Court an overview of the nature of scientific evidence that mesothelioma victims routinely present in asbestos cases to demonstrate the basis

for their claims, the Committee will offer testimony from several expert witnesses who have published many articles in the peer-reviewed literature about issues related to asbestos. The Committee is not offering this testimony to prove specific causation in any particular case or group of cases, because that issue is not before the Court. Rather, the Committee's experts will testify, based on a voluminous body of scientific literature, that: (i) chrysotile asbestos, the type found in gaskets made by Garlock, causes mesothelioma; (ii) there is no safe level of exposure to any type of asbestos, including chrysotile; (iii) exposures to asbestos as brief as a few days can cause mesothelioma by themselves; (iv) mesothelioma is caused by the cumulative amount of asbestos exposure, so the more asbestos a person is exposed to, the greater the risk; (v) the medical and industrial hygiene literature demonstrates that workers replacing gaskets and bystanders breathe in hundreds of thousands to millions of asbestos fibers in a few hours, levels thousands of times higher than what is found in "background ambient air"; and (vi) working with asbestos-containing gaskets is considered to be sufficiently hazardous by various governmental agencies that safety precautions are required. Garlock's "science" does not impugn the physical basis of mesothelioma claims against Garlock, nor justify a low estimate out of line with Garlock's historical resolutions of such claims.

CONCLUSION

In estimation, the parties will address one of the central issues that must be resolved in order for this case to progress towards a confirmable plan of reorganization. We have attempted to highlight in this brief some of the major issues to be joined at trial. The Committee urges the Court to adhere to an unbroken line of precedent, extending from *Eagle-Picher* to *Bondex*, with respect to the correct methodology for aggregate estimation of present and future mesothelioma claims against Garlock. The Court should assess the evidence under standards that demand

realism and rigor without pretending to mathematical exactitude. Garlock should bear a significant burden when it seeks a low estimate, for the benefit of its parent company and at the expense of tort victims, based on a revisionist view of its claims history and resolution experience.

Respectfully submitted

Dated: July 8, 2013

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EXHIBIT A

10-1167

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE	: Reorganization Nos. 82 B 11656 through
JOHNS-MANVILLE CORP., et al.,	: 82 B 11676 Inclusive
Debtors.	:
GAF CORPORATION, KEENE CORPORATION, ARMSTRONG WORLD INDUSTRIES, INC., H.K. PORTER COMPANY, INC., PITTSBURGH CORNING CORPORATION, GARLOCK, INC., EAGLE-PICHER INDUSTRIES, INC., THE CELOTEX CORPORATION, and FIBREBOARD CORPORATION, on behalf of themselves and the Unofficial Committee of Asbestos Case Co-Defendants,	: Adversary No. 82-6221
Plaintiffs,	:
-against-	:
JOHNS-MANVILLE CORPORATION, et al.,	:
Defendants.	:

MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE	:	
JOHNS-MANVILLE CORP., et al.,	:	Reorganization Nos. 82 B 11656
Debtors.	:	through 82 B 11676 Inclusive
GAF CORPORATION, KEENE CORPORATION, ARMSTRONG WORLD INDUSTRIES, INC., H.K. PORTER COMPANY, INC., PITTSBURGH CORNING CORPORATION, GARLOCK, INC., EAGLE-PICHER INDUSTRIES, INC., THE CELOTEX CORPORATION, and FIBREBOARD CORPORATION, on behalf of themselves and the Unofficial Committee of Asbestos Case Co-Defendants,	:	Adversary No. 82-6221
Plaintiffs,	:	
-against-	:	
JOHNS-MANVILLE CORPORATION, et al.,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

This memorandum is submitted in support of plaintiffs' motion for summary judgment on its complaint for a declaration interpreting and applying the automatic stay in this case to all of the 11,000 asbestos-related personal

injury and property damage suits (the "asbestos litigation" or "asbestos lawsuits") to which Manville Corporation or any of its affiliates (collectively "Manville" or "Debtors") is a party, irrespective of whether the Debtors have been severed, and as applicable to all parties in the asbestos lawsuits in which Manville is a defendant. Alternatively, plaintiffs seek to lift the automatic stay so as to permit the asbestos litigation to proceed to the point of judgment as against all parties including the Debtors. Plaintiffs submit that this Chapter 11 case is so extraordinary and the Debtors' involvement in the subject litigation so inextricably bound up with the rights and responsibilities of plaintiffs and the class they represent that this Court must exercise its power pursuant to Bankruptcy Code §105 to preserve the status quo in the interest of facilitating a comprehensive plan of reorganization which will resolve on a global basis the complex asbestos-related claims of thousands of plaintiffs and potential plaintiffs against miners, manufacturers, distributors, contractors and insurance carriers.

FACTS

On August 26, 1982, Manville filed with this Court petitions for reorganization under title 11, Chapter 11, United States Code (the "Bankruptcy Code"). The Debtors continue to operate their businesses and manage their properties as debtors-in-possession under Sections 1107 and 1108

of the Bankruptcy Code. Manville is a diversified manufacturing, mining and forest products company, conducting its business through five principal operating subsidiaries.

Manville is the world's largest miner, processor, manufacturer and supplier of asbestos and asbestos-containing products. The Manville Chapter 11 cases are unprecedented, for the Debtors appear to be healthy companies with a substantial net worth. Manville's difficulties arise from its position as defendant or co-defendant in the asbestos litigation brought by more than 15,550 plaintiffs* throughout the United States. Suits are pending in 46 states. Some court systems have more than 2000 asbestos lawsuits presently pending. An average of 425 new asbestos lawsuits per month were brought against Manville pre-petition and it estimates that approximately 32,000 additional suits could be brought against it in the next twenty-seven years.

According to Manville, its current cost for the suits is estimated at approximately $40,000 per case, includ-

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* Plaintiffs in the underlying asbestos litigation will be referred to as "claimants" or "plaintiffs." The plaintiffs in this adversary proceeding and the class they represent will be referred to as "Co-Defendants." Named Co-Defendants are Armstrong World Industries, Inc., The Celotex Corporation, Eagle Picher Industries, Inc., Fibreboard Corporation, GAF Corporation, Garlock, Inc., H.K. Porter Company, Inc., Keene Corporation and Pittsburgh Corning Corporation.

ing defense expenses, but excluding cases on appeal. Manville has disclosed that since 1981, it has been found liable for punitive damages in several asbestos lawsuits and anticipates additional exemplary damage awards which greatly increase its potential liabilities. According to a study commissioned by Manville, its potential liability in the asbestos litigation will be not less than $2 billion over the next twenty years. These enormous actual and potential liabilities faced by Manville in the asbestos litigation were the principal reason for the Chapter 11 filings.

In addition to its litigation with the plaintiffs, Manville is engaged in litigation with its insurance carriers in respect of its coverage for the claims asserted against it in the asbestos litigation. Johns-Manville Corporation v. The Home Insurance Company, No. 765226 (Cal. Sup. Ct., San Francisco Co.). Manville's insurance carriers have to this point largely disclaimed coverage and have refused to conduct the defense of, or to indemnify Manville from its liability in the asbestos lawsuits. Other defendants have been more successful in efforts to compel their insurers to honor their policies. Keene Corp. v. Insurance Company of North America, 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 102 S.Ct. 1644 (1982).

Background of the Asbestos Litigation

The asbestos litigation arises out of extensive use of thermal insulation products containing asbestos in the construction industry and shipyards. There was an increase in the use of this insulation starting with ship-building in World War II and the construction boom following the war. In 1965 Dr. Irving Selikoff, Chief of Mt. Sinai's Environmental Medicine Program, published a study called "The Occurrence of Asbestosis Among Insulation Workers in the United States." Dr. Selikoff's study of the asbestos workers' union indicated that some insulation workers were contracting a disease called asbestosis. Subsequent to Dr. Selikoff's study, warnings were placed on thermal insulation products containing asbestos and attempts were made to find a substitute for asbestos.

By 1972, some substitutes had been found for asbestos in some thermal insulation products and other thermal insulation products for which no asbestos substitute could be found were discontinued. Asbestos continued to be used in other areas.

Types of Suits -- Personal Injury, Property Damage

There are two types of asbestos lawsuits: (1) personal injury lawsuits by persons who claim they are suffering from an asbestos related disease and (2) property damage

lawsuits in which the plaintiff claims injury to his property because of the presence of asbestos. The typical suit pleads strict liability, negligence (including failure to warn) and breach of warranty. Some suits contain conspiracy allegations and some seek punitive damages. Punitive damages are generally actively pursued against companies such as Manville which are claimed to have had early knowledge of asbestos related diseases and to have done nothing to prevent injury to the public.

There are approximately 11,000 lawsuits pending nationwide against various defendants in both state and federal courts. More than half of these cases arise out of the shipyards and there are large concentrations of cases in coastal states such as Pennsylvania, Mississippi, Louisiana, Texas and California.

Types of Plaintiffs

The personal injury cases are usually brought by insulators, members of the asbestos workers' union, and by members of allied trades such as welders or painters; a few claim to have been exposed to asbestos by the fibers brought home on the clothes of the worker, so-called household exposures or laundry cases. Property damage cases have primarily been brought by school districts.

Defendants

Typically, parties named as defendants in the asbestos litigation include participants at every level of the chain of distribution of asbestos-containing thermal insulation products: asbestos fiber miners, fabricators of raw asbestos, manufacturers of asbestos-containing thermal insulation products, distributors of such products, insulation contracting companies, and life and casualty insurance carriers, who have at one time or another provided insurance coverage for one or more of the foregoing companies.

Most insurance carriers have denied coverage for the asbestos claims, and at least two dozen actions are now pending to resolve these coverage questions. The problem is exacerbated by the fact that it is frequently difficult to identify the insurance carrier which issued coverage 30 to 40 years ago.

For decades the United States Government was a supplier, specifier, consumer and promoter of asbestos products. Thousands of claimants in the asbestos litigation have alleged injurious exposure to asbestos dust while working in shipyards owned by or under contract to the U.S. Navy. The claimants allege that the Government knew of the potential hazards from asbestos exposure as early as the 1930s yet made little or no effort to educate its workers or to institute adequate workplace practices.

Asbestos Related Injuries

In recent years it has been found that significant and repeated exposure to asbestos, usually over relatively long periods of time, can cause injury or disease. These injuries or diseases (e.g., asbestosis and mesothelioma), may not appear until 20 to 40 years after initial exposure. Asbestosis is a scarring of the lung which gradually restricts the capacity of the lung to function. Mesothelioma is a malignant tumor of the lining of the lung or the stomach cavity.

Studies of asbestos workers have shown an increase in lung cancer over the statistics expected in the general population. The cases of lung cancer are almost invariably seen in workers who smoke. Thus, it is uncertain whether exposure to asbestos causes lung cancer.

Pendency of Asbestos Lawsuits

In the late 1960's and early 1970's a few asbestos lawsuits were brought against some asbestos mining companies such as Manville and manufacturers of thermal insulation products containing asbestos.

In Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974), the court held that since it was impossible to determine with absolute certainty which particular exposure to asbestos

resulted in the manifested injury, each manufacturer who contributed to the injury was jointly and severally liable for the total damages. Id. at 1094-96.

Starting in 1976 the number of asbestos cases grew exponentially. There were approximately 42 cases pending as of January 1, 1976; by August 1982, over 11,000 cases had been filed against various defendants.

Manville, due to its preeminent position in the asbestos industry is indisputably the principal defendant and the most important party in virtually all of the asbestos lawsuits. Manville as miner, processor, manufacturer and supplier enjoys the largest market share in the asbestos industry. Accordingly, Manville has been the principal contributor toward settlments and judgments in the asbestos lawsuits, and taken the "lead" position among the defendants in acting as custodian of documents, furnishing witnesses and securing expert testimony for all defendants. Moreover, its counsel has been the chief spokesman for the defense, coordinating and presenting the evidence on behalf of all co-defendants and assuming the principal role in settlement negotiations. Most important, Manville is uniquely positioned in the asbestos litigation, being possessed of the expertise, documentary evidence and witnesses essential to the trial of the actions.

In short, Manville is an indispensable party to the asbestos litigation without whose presence a full, final and equitable resolution is impossible.

Over 200 companies other than Manville have been named as defendants in one or more asbestos cases. Manville has been, in many cases, the architect of the Co-Defendants' involvement in the asbestos litigation. Seeking to limit its own exposure and to compel spreading of the liability, Manville has regularly impleaded the Co-Defendants in actions where the plaintiffs themselves did not name them as parties. Approximately ten to twenty co-defendants, including Manville, are present in most of the suits even though, in many instances, Manville was the supplier of the raw asbestos fiber to these entities.

In many cases, the plaintiffs have asserted that the co-defendants are jointly and severally liable. The Co-Defendants have claims for contribution and indemnity against Manville many of which have been asserted in cross-claims and separate actions. These claims constitute the basis for the status of the Co-Defendants as creditors of Manville within the meaning of Section 101(9) of the Bankruptcy Code.

Because of the multiplicity of defendants in the asbestos lawsuits, apportionment of liability among them is necessary for a determination in any given suit

Thus, the rights of Manville and the co-defendants are inextricably bound together. A determination of the asbestos litigation without Manville's presence will only complicate the situation. It certainly will not facilitate a resolution of claims against Manville on the part of plaintiffs or resolution of the claims for contribution and indemnity on the part of the Co-Defendants.

Manville's bankruptcy has caused chaos in the asbestos lawsuits. Immediately after the filing, individual plaintiffs and defendants other than Manville applied to hundreds of judges in state and federal courts throughout the country, each trying to protect its respective rights in the asbestos litigation. The courts have been deluged with motions for adjournments, stays, severances, protective orders and the like.

The state and federal courts in which the asbestos litigation is pending have been grappling with the effect upon such litigation of the automatic stay in the Manville Chapter 11 cases under Section 362(a) of the Bankruptcy Code. The results are inconsistent and disruptive. Some courts have stayed the litigation as to all parties by reason of the automatic stay; other courts have stayed the litigation as to all the parties for a limited period of time pending clarification from this Court; still other courts have only stayed the litigation as to Manville, severing Manville and allowing the other parties to proceed

with discovery and trial; many courts have as yet to rule on the matter.

Unless this Court intervenes, there will be inconsistent, inconclusive and only partial liquidation of some of the asbestos related claims rather than a global, comprehensive and complete resolution of all claims through the medium of a consensual plan of reorganization. Only the Bankruptcy Court can properly interpret the scope and extent of Section 362(a) as it applies to the facts of this case.

Unless this Court intervenes:

1. Considerable time, effort and expense will be incurred in the piecemeal trial of selected asbestos lawsuits on the part of Manville witnesses and personnel despite the automatic stay, since Manville is the repository of evidence essential to plaintiffs and Co-Defendants alike.

2. Virtually all plaintiffs in the asbestos lawsuits were predominantly exposed to asbestos and thermal insulation products containing asbestos manufactured and sold by Manville; if Manville is severed from the asbestos lawsuits, their claims for alleged asbestos-related injuries will have to be tried twice, causing a waste of judicial resources.

3. No realistic settlement possibility exists in the asbestos litigation without Manville, which has paid the largest share of such settlements, usually contributing from 10% to 50% of the entire amount.

4. The Co-Defendants may be unable to secure documents and witnesses for trial to help exculpate themselves; exposure to Manville's products and Manville's responsibility for claimants' alleged injuries are inextricably intertwined with claimants' claims against the Co-Defendants who remain in the cases after the severance of Manville.

5. Cross-claims and third-party claims which have been asserted by and against Manville cannot be presented to a court without its presence at trial, thereby necessitating duplicative trials on the issues of contribution and indemnification.

6. Manville has coordinated defense efforts on behalf of all of the co-defendants and has retained experts and witnesses for trial in many jurisdictions with Manville's attorneys often serving as lead trial counsel; these functions will have to be duplicated at enormous cost to other parties.

7. Manville's counsel has acted as custodian of voluminous defense records and documents in most jurisdictions; these functions will have to be duplicated, further increasing costs.

A continuation of the present confusion in the asbestos litigation will interfere with the administration of Manville's estate, and the ability of this Court to preside over a rational and orderly liquidation of the

plaintiffs and Co-Defendants' claims against the Debtors in the Chapter 11 cases will be impaired. Unless order is created in the asbestos litigation by this Court an equitable and even-handed treatment of Manville's creditors in the Chapter 11 case in the context of a plan of reorganization will be impossible.

This Court has the opportunity to resolve the asbestos litigation crisis which can only be accomplished with the participation of Manville, the party with the single greatest stake in the litigation. If this Court does not take advantage of this opportunity, Manville will be irreparably harmed and other defendants will be faced with additional significant financial burdens. The Co-Defendants believe that one defendant may shortly seek protection under the Bankruptcy Code.

The alternative relief requested by the Co-Defendants, a modification of the automatic stay pursuant to Section 362(d) of the Bankruptcy Code to allow the continued prosecution of the asbestos lawsuits with Manville as a party, is entirely consistent with the Co-Defendants' position that the claims of all parties must be determined on the same basis rather than in a piecemeal fashion. Because the claims of all parties to the asbestos litigation are inextricably intertwined, they must be heard and resolved together.

Therefore, in the event this Court does not find that the stay under Section 362(a) of the Bankruptcy Code applies to all parties to the asbestos litigation, modification of the automatic stay as to Manville is both necessary and proper. To permit the asbestos litigation to proceed without Manville will perpetrate a manifest injustice.

ARGUMENT

I.

APPLICATION OF THE AUTOMATIC STAY TO ALL PARTIES IN THE ASBESTOS LITIGATION IS NECESSARY AND PROPER

A. Section 362

Section 362(a)(1) of the Bankruptcy Code provides as follows:

> "§ 362. Automatic stay.
>
> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title operates as a stay, applicable to all entities, of --
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title. . . ."

The automatic stay is a traditional and basic protection afforded to debtors under the bankruptcy law. It

provides the debtor with a respite from creditor suits in forums other than the bankruptcy court and enables a debtor in Chapter 11 to concentrate its efforts on effectuating a reorganization plan.

The automatic stay also provides creditor protection. As the legislative history states:

> "Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that."

House Report No. 95-595, 95th Cong., 1st Sess. (1977) 340-2; Senate Report No. 95-989, 95th Cong., 2d Sess. (1978) 49-51. Thus, one of the purposes of the automatic stay is to preserve a debtor's estate and maintain the status quo so as to assure a systematic and equitable distribution for the benefit of all creditors. It is designed to prevent a chaotic and uncontrolled scramble for a debtor's assets in a variety of uncoordinated proceedings in different courts. Fidelity Mortgage Investors v. Camelia Builders, Inc. (In re Fidelity Mortgage Investors), 550 F.2d 47, 55 (2d Cir. 1976), cert. denied, 429 U.S. 1093 (1977).

The reason that Manville deemed the filing of the Chapter 11 petitions to be an "economic imperative" was because it is "only . . . [under] Chapter 11 of the Bankruptcy Code that all claims against the Debtors [in the

asbestos lawsuits] be liquidated or estimated, and be treated within the framework of a plan of reorganization . . ." Affidavit of James F. Beasley under Additional Local Rule XI-2, sworn to on August 26, 1982, p. 8 (the "Beasley Affidavit"). Manville intends to "formulate effective procedures to accomplish precisely that [a treatment of claims in a reorganization] in a manner which will not improperly favor any creditor over any other creditor similarly situated; be consistent with the fundamental bankruptcy tenet of equality of distribution and permit Manville to emerge as a viable and profitable business." Beasley Affidavit, pp. 8-9. Thus, Manville's aims are consistent with one of the policies and purposes of the automatic stay, the implementation of an orderly liquidation procedure for the debtor in the Bankruptcy Court. However, if the asbestos lawsuits are permitted to proceed without Manville the essential policy will be frustrated.

Whether or not Section 362 of the Bankruptcy Code in the ordinary case stays lawsuits against nondebtor parties, the compelling facts here mandate that the claims of all litigants in the asbestos litigation be determined in a unified and rational fashion. Because the claims of all other parties are inextricably tied to Manville all parties will be severely prejudiced if the asbestos lawsuits proceed without Manville. Manville and its estate will be harmed because continuation of the asbestos lawsuits will interfere

with the administration of the estate, as the ability of the Debtors and this Court to effect a rational and orderly liquidation of the asbestos claims will be impaired. Moreover, Manville will be inevitably involved through pre-trial discovery and the presentation of documentary and testimonial evidence of which it is the sole repository.

The claims and defenses of the Co-Defendants in the asbestos lawsuits are tied to Manville. Asbestos cases involve not only issues of negligence and strict liability by defendants in respect of plaintiffs, but also issues among defendants, such as indemnity, comparative negligence, apportionment against alleged tortfeasors and primary and secondary liability with respect to sellers of thermal insulation products containing asbestos and suppliers of the raw asbestos fiber. These issues cannot be determined separately, but require unified adjudication to evaluate the merits of the asbestos plaintiffs' claims and to allocate fault, if any, among the defendants. Certainly this process involves Manville, the world leader in all facets of the asbestos business and the principal supplier of asbestos fiber to most of the Co-Defendants.

The plaintiffs' chief evidence in most asbestos trials is directed against Manville and pertains to the knowledge and conduct of Manville regarding asbestos related diseases. In some of the asbestos lawsuits a conspiracy among Manville and the other defendants is alleged. In such

cases, the evidence against Manville becomes even more critical to the Co-Defendants' ability to limit their alleged liability.

Many courts have considered whether an action in a non-bankruptcy forum involving the debtor and other defendants should be stayed as to all parties. In Federal Life Insurance Co. (Mutual) v. First Financial Group of Texas, Inc., 3 B.R. 375 (S.D. Texas 1980), an action to recover damages from a corporate debtor in bankruptcy and individual co-defendants for alleged fraud, the plaintiff moved to sever its claims against the non-bankrupt individual defendants so that it could proceed to judgment despite the automatic stay. The district court denied the severance on the grounds that the claims against the individuals were inextricably intertwined with the claims against the corporate debtor; there were common questions of law and fact; and severance would unduly hinder the efforts of the Bankruptcy Court. The district court, in denying the severance, relied upon its broad discretionary powers under Rule 42(b) of the Federal Rules of Civil Procedure. The district court also noted that the separate trial of an issue or claim requires that it be "so distinct and separate from the others that a trial of it alone may be had without injustice." In so holding, the district court cited Swofford v. B. & W., Inc., 336 F.2d 406, 415 (5th Cir. 1964), cert. denied, 379 U.S. 962 (1965) and Lusk v. Penzoil United, Inc., 56 F.R.D. 645

(N.D. Miss. 1972). In Federal Life, the only reason for the severance motion on the part of the plaintiff was the effect of the automatic stay occasioned by the corporate bankruptcy. The district court held that this was an insufficient ground. It found that "to order a severance of the individual defendants would not be conducive to judicial economy and would unduly hinder the efforts of the Bankruptcy Court." 3 B.R. at 376. The district court in Federal Life also found that any resulting delay or prejudice to the plaintiff was outweighed by the aforementioned considerations:

> "In light of the above, the Court is persuaded that the automatic stay applies to judicial proceedings against the debtor in bankruptcy and its co-defendants, when, as here, the allegations against them arise from the same factual and legal basis. Accordingly, the Court is of the opinion that further proceedings in this cause are stayed with respect to [the corporate debtor and the individual defendants] unless the stay is lifted by the Bankruptcy Court."

3 B.R. at 377.

In a product liability situation analogous to that presented here, the Bankruptcy Court in In re White Motor Credit Corp., 11 B.R. 294 (N.D. Ohio 1981), rev'd on other grounds, No. 681-1088 (N.D. Ohio, September 20, 1982), denied a motion to vacate an order appointing a special master to determine 160 product liability claims against the Chapter 11 debtor. The Bankruptcy Judge discussed the reasons necessitating the appointment of a special master, noting that:

> "All of the products liability suits have been effectively stayed by operation of section 362 of the Code, 11 U.S.C. § 362(a). . . . For many reasons (perhaps including section 362 itself), products liability plaintiffs cannot dismiss a reorganization debtor and proceed against co-defendants only."

11 B.R. at 295.

The basis for the decision in Federal Life, that the asserted liability of the debtor and its co-defendants "arise from the same factual and legal basis," was not mentioned in White Motor. In White Motor, some of the factors present in the asbestos lawsuits also appeared, but to a lesser extent. White Motor was one of several co-defendants in about 160 product liability suits around the country. Due to the multiplicity of actions and parties, the possibility of inconsistent adjudications, and serious questions about insurance coverage, the court had determined that "should the claimants proceed in the many jurisdictions with the 160 pending actions, substantial uncertainty and chaos would clearly ensue." Id. at 296. Such "uncertainty and chaos" would be greater by several orders of magnitude in the asbestos lawsuits if the automatic stay is not construed to apply to all parties. See also, In re Zamost, 7 B.R. 859 (S.D. Cal. 1980) (the bankruptcy court held to have jurisdiction over debtor's co-defendants, since the court deemed all of the parties necessary to a resolution of the issues).

Other courts strictly interpreting the scope of the automatic stay under the Bankruptcy Code have held that it does not operate to protect co-defendants or other non-debtors.* In none of these cases were the claims inseparable, presenting common questions of law and fact. For example, in Royal Truck & Trailer, Inc. v. Armadora Maritima Salvadorena, S.A., 10 B.R. 488 (N.D. Ill. 1981), and in In re Larmar Estates, Inc., 5 B.R. 328 (E.D.N.Y. 1980), the courts refused to extend the protection of the automatic stay to co-defendant guarantors of the debtor. However, the rationale behind an obligee's insistence that an obligation be guaranteed is that the obligee can proceed against the guarantor should the obligor become insolvent. Assumption of liability by

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* Cases decided under the former Bankruptcy Act turned upon the jurisdiction of the Bankruptcy Court thereunder which was based upon the concept of possession of the debtors' property are inapplicable. See, e.g. Teledyne Industries, Inc. v. Eon Corporation, 401 F. Supp. 729 (S.D.N.Y. 1975), aff'd., 546 F.2d 495 (2d Cir. 1976) ("In this action, the plaintiff is seeking to impose liability on the individual defendants personally. The subject matter of this lawsuit is clearly not property in the actual or constructive possession of [the debtor]." See also, Feldman v. Trustees of Beck Industries, Inc. (In re Beck Industries, Inc.), 479 F.2d 410, 415-16, cert. denied, 414 U.S. 858 (1973) (Bankruptcy court cannot restrain state court action directed against wholly-owned subsidiary of Chapter X debtor absent a showing that subsidiary is a sham or alter ego of debtor because dispute would not affect title to debtor's property). Such cases are inapposite due to the expansion of the Bankruptcy Court's jurisdiction under the Bankruptcy Code and 28 U.S.C. § 1471.

the guarantor is not only contemplated but bargained for. The Co-Defendants never agreed to be guarantors of the Debtor in respect of the asbestos litigation.

Similarly, other holdings denying the applicability of the automatic stay to non-debtor co-defendants, e.g., Aboussie Brothers Construction Company v. United Missouri Bank of Kirkwood (In re Aboussie Brothers Construction Company), 7 Bankr. Ct. Dec. (CRR) 309, 8 B.R. 302 (E.D. Mo. 1981), and Rupp v. Cloud Nine, Ltd. (In re Cloud Nine, Ltd.), 3 B.R. 202 (D.N.M. 1980), are inapplicable. In those cases the debtor was a partnership, the co-defendants were individual partners, and the partnership was merely a nominal party in the actions and was not independently liable on any of the claims.

Cases in which the liability of a debtor and its non-debtor co-defendants arise from substantively different acts also do not present "common questions of law and fact," and some courts in these cases have declined to apply the automatic stay to proceedings to such co-defendants. See, e.g., In re REA Express, Inc. (Walker v. Sowerwine), 23 C.B.C. 245, 249 (S.D.N.Y. 1980) (Court modified Chapter 11 stay to allow plaintiffs to proceed with employment discrimination claims against co-defendant labor union whose alleged discriminatory acts were "distinct, separate and entirely severable" from those of bankrupt employer) and duPont Glore Forgan v. Bernhard, 73 F.R.D. 313 (S.D.N.Y. 1976) (severance

of securities fraud claims against bankrupt issuer of securities from claims against co-defendant seller of those securities granted, where the alleged fraudulent acts of the issuer and the seller were distinct and different).

In Royal Truck, supra, 10 B.R. 488 the district court held that an action against a debtor and a co-obligor under a lease could proceed against the co-obligor even though the debtor had filed a Chapter 11 petition. Significantly, the court stated that "something more than the mere fact that one of the parties to this lawsuit has filed a Chapter 11 bankruptcy petition must be shown in order that proceedings be stayed against non-bankrupt parties." 10 B.R. at 491. In Royal Truck the movant failed to demonstrate that the debtor was an indispensable party within the meaning of Rule 19 of the Federal Rules of Civil Procedure.

Citing Provident Tradesmen Bank & Trust Co. v. Patterson, 390 U.S. 102, 109-110 (1968), the district court in Royal Truck discussed the four "interests" suggested by Rule 19(b): (a) the interest of the plaintiff in having a forum, (b) the interest in avoiding multiple litigation, inconsistent relief, or of the parties to the litigation bearing sole responsibility for liability shared with another, (c) the interest of the party sought to be joined and whether, as a practical matter, his absence might impair his ability to protect his interest in the subject matter, and (d) the interest of the courts and the public in complete, consis-

tent and efficient settlement of controversies. 10 B.R. at 492.

Here, the REA and Royal Truck criteria are met. Manville is indispensable to the asbestos lawsuits. The liability of the debtor and its co-defendants is not "distinct, separate and entirely severable"; it is largely joint and several. In the event the asbestos lawsuits proceed without Manville, multiple litigation will result with the plaintiffs litigating first with the Co-Defendants and then with Manville in the Bankruptcy Court or separately elsewhere. The Co-Defendants will also have to litigate their contribution and indemnity claims against Manville in separate proceedings. Requiring multiple proceedings in over 11,000 cases which have already overburdened and clogged state and federal courts would harm the interests of litigants and the judicial system. A piecemeal approach to the asbestos litigation would permit Manville, the industry leader and principal defendant, to obtain an unfair advantage by using the automatic stay as a sword to escape its responsibilities by placing the primary burden of the asbestos litigation on the Co-Defendants. Such use of Section 362 is manifestly improper.

> "We are, however, cognizant of the precedential import of our rulings and must be cautious to avoid a decision which could convert [the automatic stay] from a shield into a weapon."

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Bohack Corp. v. Borden, Inc., 599 F.2d 1160 (2d Cir. 1979).

In the event the asbestos litigation proceeds without Manville, it may impair the debtor's ability to protect its own interests because the opportunity to achieve an orderly liquidation of all asbestos claims may be prematurely frustrated. Those plaintiffs who race to judgment before a plan is formulated will secure an unfair advantage over other claimants who, in turn, will be less likely to reconcile their differences with the debtor and other creditors. Indeed, if plaintiffs must obtain redress only in the context of Manville's Chapter 11, they will be more amenable to compromise. Additionally, the public interest and the interest of the entire judicial system in achieving a consistent disposition of the asbestos litigation is the overriding factor which requires all of the asbestos claims to be settled in a unified manner. Piecemeal and inconsistent determinations in the asbestos litigation are destructive of the equitable treatment to which all parties before the Bankruptcy Court are entitled.

The Co-Defendants do not seek to deprive the plaintiffs of a forum. Rather, whether the chosen forum is the respective courts in which the asbestos lawsuits are pending, or the Bankruptcy Court, the Co-Defendants contend that all parties, including Manville, should have their claims determined in a comprehensive, consistent and equitable manner.

Whereas movants contend that Section 362(a) of the Bankruptcy Code automatically operates to stay the prosecution of the asbestos lawsuits against all parties including the Co-Defendants, it is clear that this Court has the inherent power to so construe and apply Section 362(a) in the context of this extraordinary case. Section 105 of the Bankruptcy Code and 28 U.S.C. §1481 invest the Court with such authority.

B. Section 105

Section 105(a) of the Bankruptcy Code provides:

> "The bankruptcy court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title."

Section 105 is derived from Section 2a(15) of the former Bankruptcy Act* but is even broader than the earlier provision as a result of the expanded jurisdiction of the Bankruptcy Courts under the Bankruptcy Code. See 28 U.S.C. § 1471.

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* Section 2a(15) provided that Bankruptcy Courts could:

> "Make such orders, issue such process and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act. . . ."

> "Section 105(a) is a major departure from prior law in that it is in no way circumscribed by possession or custody of a res. The basic purpose is to enable the bankruptcy court to do whatever is necessary to aid its jurisdiction, i.e., anything arising in or relating to a bankruptcy case."

2 Collier on Bankruptcy ¶ 105.02, p. 105-3 (15th ed. 1982).

Section 105(a) is similar to the All Writs Statute, 28 U.S.C. § 1651. Because it also covers "powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute, . . . Section 105(a) is broader than the All Writs Statute." Collier, supra, ¶ 105.02, p. 105-2. The cases decided under the Bankruptcy Code confirm that Section 105(a) invests the Bankruptcy Courts with broader power and authority.

> "Section 105(a) is an intentionally broad grant of authority to the United States Bankruptcy Courts to facilitate the orderly administration of bankruptcy cases. This section is much broader than its predecessor, § 2(A)(15) of the prior Act. Unlike the restriction under prior law that an order of a bankruptcy court must be "necessary for the enforcement of the provisions of this title," § 105 authorizes the bankruptcy court to also issue orders 'appropriate to carry out the provisions of this title.' The power contained in § 105 is arguably more extensive than that contained in All Writs Statute, 28 U.S.C. § 1651.
>
> "Section 105 complements the all encompassing grant of jurisdiction now contained in 28 U.S.C. § 1471. . . ."

In re Howell, 4 B.R. 102, 105 (M.D. Tenn. 1980).

Section 1481 of title 28 grants the Bankruptcy Court the powers of courts of equity, law and admiralty, although it prohibits the Bankruptcy Court from issuing an

injunction against another court or from punishing a criminal contempt not committed in the presence of the judge or warranting a punishment of imprisonment. Save for those exceptions, the Bankruptcy Court as a court of equity has the authority to issue a wide range of injunctive relief. Ex parte Baldwin, 291 U.S. 610 (1934).

Section 105(a) of the Bankruptcy Code enables the Bankruptcy Court in its discretion to stay actions not directly covered by the automatic stay. In In re Lake, 11 B.R. 202, 205 (S.D. Ohio 1981), the court stated that:

> "The use of § 105(a) of the Bankruptcy Code to extend the reach of the automatic stay provided for in § 362 was clearly contemplated by the drafters of the legislation:
>
> > 'The Court has ample powers to stay actions not covered by the automatic stay. Section 105 of proposed Title XI derived from the Bankruptcy Act, Section 2a(15), grants the power to issue orders necessary or appropriate to carry out the provisions of Title XI. . . . By excepting an act or action from the automatic stay, the bill simply requires that the trustee move the Court into action, rather than requiring the stayed party to request relief from the stay.' (House Report No. 95-595, 95th Cong., 1st Sess. (1977), 342-3; Senate Report No. 95-989, 95th Cong., 2d Sess. (1978) 51-2)."

See also, In re King Memorial Hospital, Inc., 4 B.R. 704, 709 (S.D. Fla. 1980) ("[T]he legislative history of the Section [105] indicates that it would be applicable to those exceptions to the automatic stay provisions of Section 362(b)").

The power of the Bankruptcy Court to enjoin under Section 105(a) has been extended to a creditor's action against a co-debtor or guarantor. In the recent case of In re Otero Mills, Inc., 21 B.R. 777 (D.N.M. 1982), the debtor sought an injunction under Section 105 of the Bankruptcy Code to prohibit a bank from proceeding against the corporate debtor's president in state court. The president had guaranteed the obligations of the debtor to the bank. The Bankruptcy Court held that the power to enjoin under Section 105(a) can be extended to an action against a co-debtor, stating "[t]o so enjoin a creditor's action against a third party, the court must find that the failure to enjoin would affect the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through that third party." 21 B.R. at 778. Accord, First Federal Savings & Loan Ass'n of Little Rock v. Pettit, 510 F. Supp. 226, 228 (E.D. Ark. 1981) (District Court affirmed the Bankruptcy Court's finding that an action against a co-debtor would interfere with the proposed plan of reorganization).

The power of this Court under Section 105 of the Bankruptcy Code to enjoin parties is consistent with the general policy established by the federal courts that injunctions may issue to avoid piecemeal litigation. In Landis v. North American Co., 299 U.S. 248, 254 (1936) (Cardozo, J.), the Supreme Court held that "the power to

stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants." The Court also stated that:

> "Occasions may arise when it would be 'a scandal to the administration of justice' . . . if the power to coordinate the business of the court efficiently and sensibly [through granting stays] were lacking altogether."

299 U.S. at 255.

In Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 189 F.2d 31, 34 aff'd, 342 U.S. 180 (1951), the validity of a patent was at issue in actions in two courts; all the parties were present in an action in the Northern District of Illinois, while the federal district court for the District of Delaware lacked jurisdiction over a not-indispensable but necessary party. The Court of Appeals for the Third Circuit reversed the Delaware District Court's denial of a motion to stay the Delaware action, stating:

> "In the instant case the whole of the war and all the parties to it are in the Chicago theatre and there only can it be fought to a finish as the litigations are now cast. On the other hand if the battle is waged in the Delaware arena there is a strong probability that the Chicago suit nonetheless would have to be proceeded with for Acme is not and cannot be made a party to the Delaware litigation. The Chicago suit when adjudicated will bind all the parties in both cases. Why, under the circumstances, should there be two litigations where one will suffice? We can find no adequate reason."

189 F.2d at 34 (1951) (emphasis supplied). Applying this authority to Manville and the asbestos litigation, this

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Court should not countenance a multiplicity of actions when the asbestos litigation can be disposed of in a unified manner.

Upon requests for injunctive relief under Section 105(a) of the Bankruptcy Code, Rule 65 of the Federal Rules of Civil Procedure, made applicable in adversary proceedings by Rule 765 of the Rules of Bankruptcy Procedure, guides the Bankruptcy Court. A party requesting an injunction under Section 105(a) must therefore show that in the absence of an injunction it will suffer irreparable injury and that it is likely to prevail on the merits. Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975); Otero Mills, supra, 21 B.R. at 778-779. In the event that this Court fails to affirm the applicability of the automatic stay under Section 362(a) of the Bankruptcy Code to all parties in the asbestos lawsuits, the Co-Defendants will suffer irreparable injury and the Debtors' prospects for a global settlement of the asbestos litigation in the context of a consensual plan of reorganization will be impaired.

First, if the stays do not cover all parties to the asbestos lawsuits, the multiplicity of actions noted above will result. Not only is risk of inconsistent verdicts truly astounding, but the increased costs to the Co-Defendants resulting from multiple litigation will place added significant financial burdens upon all of them.

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Second, as set forth above, the asbestos lawsuits contain issues of comparative negligence, apportionment among joint tortfeasors and primary and secondary liability with respect to sellers of asbestos products and suppliers of the raw asbestos itself. Without the presence of Manville, the leader of the industry and the primary defendant in the asbestos lawsuits, the ability of each defendant to obtain fair adjudication of its share of liability, if any, will be impaired. Only upon a comprehensive adjudication can be a fair determination of questions of liability as to each Co-Defendant be made. To force Co-Defendants after judgment has been entered and damages to plaintiffs assessed, to pursue their claims against Manville in the Bankruptcy Court is inequitable and would result in favored treatment for the plaintiffs as creditors. Because Manville will not have been a party to the asbestos lawsuits, it will claim the opportunity to litigate de novo all issues previously determined as between the plaintiffs and the Co-Defendants.

Third, by virtue of the automatic stay, the Co-Defendants' ability to seek discovery from Manville and the production of documents or witnesses will be in jeopardy. A critical issue is the knowledge and conduct of Manville as the free world's largest asbestos miner and manufacturer with respect to both asbestos and asbestos-related diseases, as this issue is relevant to plaintiffs' claims of conspiracy and the Co-Defendants' claims for contribution and indemnity.

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If relevant Manville documents and witnesses who can attest to Manville's knowledge and conduct are not available, the Co-Defendants will be unable to complete discovery and will further be unable to prove their respective claims and defenses at trial.

Fourth, in the absence of the stays, coordinated defense efforts which have long been established in the asbestos cases are impossible. Defense groups, which include Manville and the Co-Defendants, have effectively allocated among their members the responsibilities entailed in conducting the massive discovery and preparation inherent in the asbestos litigation. Since the filing of the petition, these groups have been gravely disadvantaged because the most dominant member, Manville, is no longer a participant. This has necessarily resulted in the Co-Defendants being left with the task of attempting to quickly reallocate defense responsibilities in an attempt to prepare for cases which are now being called to trial. Equity demands that the Co-Defendants not be penalized by being forced to go to trial less than adequately prepared due to Manville's filing of a petition. Moreover, the additional costs to the Co-Defendants of conducting such discovery will be substantial.

One further point must be made. Manville is currently litigating with various insurance companies over questions of coverage of asbestos-related claims. Manville has asserted in its bankruptcy proceedings that it believes

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that its insurance policies cover many of these asbestos-related claims. While the insurers have thus far largely disclaimed coverage in these cases, a declaratory judgment action to determine the issue of coverage is now pending in the State of California. Johns-Manville Corporation, v. The Home Insurance Company, No. 765226 (Cal. Sup. Ct. San Francisco Co., filed Mar. 31, 1980).* If it should be determined that Manville is covered by insurance for some or all of these claims, Manville's defense of the asbestos-related cases in the courts in which they arose would be able to proceed without a substantial effect upon property of the estate.

It has been recognized that insurance coverage can effect a decision to lift or modify the stay of proceedings against a debtor.

> "Where the claim is one covered by insurance or indemnity, continuation of the [civil] action should be permitted since hardship to the debtor is likely to be outweighted by hardship to the plaintiff."

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* This is Manville's principal action against its insurance carriers. A subsidiary action entitled Commercial Union Insurance Company v. Johns-Manville Corporation, No. 80-306-N (D. Mass., filed Jan. 4, 1980), was brought in Massachusetts and stayed in many respects by the Massachusetts court pending resolution of many of the issues by the California court in Johns-Manville Corporation v. The Home Insurance Company. The Massachusetts action should remain stayed pending the resolution of Johns-Manville Corporation v. The Home Insurance Company in California.

2 Collier on Bankruptcy, § 362.07[3] at 362-49 (15th ed. 1979). See, also, Foust v. Munson Steamship Lines, 299 U.S. 77 (1936); In re Adolf Gobel, Inc., 89 F.2d 171, 172 (2d Cir. 1937); In re Holtkamp, 669 F.2d 505 (7th Cir. 1982); In re Honosky, 6 B.R. 667 (S.D. W.Va. 1980). In In re Holtkamp, the Seventh Circuit Court of Appeals recently affirmed the decision of a Bankruptcy Court which lifted an automatic stay imposed pursuant to Section 362(a) of the Bankruptcy Code thereby permitting a personal injury suit to proceed to judgment against the debtor. The Court of Appeals indicated that no prejudice would befall the estate because his insurance company assumed full financial responsibility for defending that litigation, and that to lift the stay in that instance would contribute to judicial economy. Likewise, if a determination is made that Manville's insurance carriers must assume its defense, there would no longer be any need for a stay against Manville in the pending lawsuits. As the Court of Appeals stated in Holtkamp,

> "[W]here, as here, the pending action is neither connected with nor interfering with the bankruptcy proceeding, the automatic stay in no way fosters Code policy. S. Rep. No. 989, 95th Cong. 2d Sess., 50, 52, reprinted in [1978] U.S. Code Cong. & Ad. News, 5836, 5838."

669 F.2d at 508. Here the asbestos lawsuits should not proceed prior to the development of a plan for the resolution of Manville's insurance coverage questions, in order to maintain a consistent and orderly approach to the asbestos litigation.

For all of the foregoing reasons, application of the stays to all parties in the asbestos lawsuits is both necessary and proper. As this Court has previously recognized, the Manville Chapter 11 cases are unique. These cases present complex and multi-faceted issues which require novel solutions. In order to establish an orderly liquidation of all claims against Manville in the Chapter 11 cases, the automatic stay should be applied to all parties to the asbestos lawsuits.

II.

IF THE AUTOMATIC STAY IS NOT APPLIED TO ALL PARTIES TO THE ASBESTOS LAWSUITS, THE AUTOMATIC STAY SHOULD BE MODIFIED TO ALLOW CLAIMS AGAINST MANVILLE TO BE TRIED WITH THOSE AGAINST CO-DEFENDANTS

Section 362(d) of the Bankruptcy Code provides:

"§ 362 Automatic Stay.

* * *

"(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest . . . ."

The legislative history of Section 362(d) states:

"Subsection (d) requires the court, on request of a party in interest, to grant relief from the stay, such as by terminating, annulling, modify-

> ing, or conditioning the stay, for cause. The lack of adequate protection of an interest in property of the party requesting relief from the stay is one cause for relief, but is not the only cause. As noted above, a desire to permit an action to proceed to completion in another tribunal may provide another cause. Other causes might include the lack of any connection with or interference with the pending bankruptcy case. . . ."

House Report No. 95-595, 95th Cong., 1st Sess. (1977) 343-4; cf. Senate Report No. 95-989, 95th Cong., 2d Sess. (1978) 52-3 (emphasis supplied).

Collier, the leading commentator, in discussing Section 362(d), states:

> "Lack of adequate protection and lack of equity are not the sole grounds for relief from the stay since section 362(d)(1) requires that the stay be vacated 'for cause' including lack of adequate protection . . . .' [emphasis added]. Actions which are only remotely related to the case under title 11 or which involve the rights of third parties often will be permitted to proceed in another forum. . . . Finally, the liquidation of a claim may be more conveniently and speedily determined in another forum."

2 Collier on Bankruptcy, ¶ 362.07(3) at 362-50 - 362-51 (15th ed. 1982) (emphasis supplied).

Should this Court decide not to grant the relief requested under Section 105(a) of the Bankruptcy Code, then the automatic stay should be modified to allow the continued prosecution of these actions with Manville as a party.

The alternative relief of modification of the automatic stay against Manville is not inconsistent with the primary relief requested by the Co-Defendants. Rather, the request for modification stems from the same fundamental

principle that in the asbestos lawsuits the claims of plaintiffs against Manville and the Co-Defendants, and the cross-claims and impleader claims between and among themselves, are inextricably interwoven, arising from the same factual and legal bases, and therefore must be heard and resolved together in a unified proceeding.

The statutory language, legislative history and decisional law regarding relief from the automatic stay for the purpose of liquidating claims against a debtor in a non-bankruptcy forum authorize this Court to permit proceedings to continue against Manville in the asbestos lawsuits. The legislative history of Section 362(d) of the Bankruptcy Code specifically indicates that "a desire to permit an action to proceed to completion in another tribunal" is adequate "cause" for modifying or lifting an automatic stay, particularly when such proceeding "lack[s] any connection with or interference with the pending bankruptcy cases."

While the outcome of the asbestos lawsuits will, of course, have a substantial impact on a Manville reorganization, the asbestos lawsuits include questions of state law negligence and products liability causes of action which can be resolved under state statutory and decisional law. The expertise of this Court will not be called into play and issues under the Bankruptcy Code are unrelated to the determination of liability. Any judgments obtained in the asbestos lawsuits will only serve to assist this Court in its adminis-

tration of Manville's estate by reducing to liquidated amounts Manville's contingent liabilities, a task which is required to be undertaken at some point in order for an effective reorganization to occur. In Holtkamp, supra, where a personal injury suit pending against the debtor was allowed to go forward in a non-bankruptcy forum, the court recognized that the pending action was not connected with nor did it interfere with the bankruptcy, stating:

> "[T]he interests of judicial economy militated in favor of permitting the suit to go forward, for the trial date had been set and witnesses . . . had been subpoenaed. Additionally, determination of the issues in the personal injury action did not require the expertise of the bankruptcy court. Under these circumstances, the lifting of the stay was proper."

669 F.2d at 508-509 (emphasis supplied).

The financial impact of granting the requested relief to proceed against Manville would not be burdensome to the debtor's estate because the process of resolving asbestos claims against Manville -- both on behalf of the plaintiffs and the Co-Defendants -- must be conducted in some forum. Allowing these claims to be resolved where they were originally brought, with the attorneys already familiar with the applicable facts and law, may well be the most economical way of handling them. Terry v. Johnson, 7 Bankr. Ct. Dec. (CRR) 1218, 12 B.R. 578 (E.D. Wisc. 1981). In Terry the Bankruptcy Court permitted a creditor who was a plaintiff in an ongoing medical malpractice suit against the

Chapter 13 debtor and co-defendant doctors and a hospital to continue the state court proceedings so that the debtor's liability could be liquidated (but continued the stay against collection or enforcement of the judgment). The Bankruptcy Court refused the debtor's argument that such a lifting of the stay would prejudice the debtor's estate, and stated:

> "Why the debtor presumes it would be cheaper to resolve the dispute in bankruptcy court was not spelled out at the hearing, but one may assume it is in reliance on Section 502(c) of the Bankruptcy Code, which authorizes this court to estimate any contingent and unliquidated claim, and also the fact that the other respondents would presumably be participating here only as witnesses -- not as parties. If claims are to be estimated, however, the court would be compelled to estimate not only Johnson's claim, but also all those of the other respondents for contribution from the debtor. In other words, Johnson is not the only one with a contingent unliquidated claim against the debtor.
>
> "Debtor's counsel was not entirely clear in specifying just how the various potential claims were to be resolved. The alternatives to permitting the debtor to participate as a party before the panel would seem to be (a) a bifurcated trial with the parties repeating the evidence in two forums, or (b) having the rights of all of the parties decided in the bankruptcy court.
>
> "Having a bifurcated trial might save the debtor some expense, particularly if the bankruptcy court "estimated" the various claims by some type of curtailed procedure, but it would certainly cost the other parties substantially more. While the other respondents may be able to sustain such added expense, there is no indication that the claimant, Johnson, is any better off financially than the debtor. Furthermore, the rights of Johnson and the other respondents, as between themselves, could not be fairly determined by such a foreshortened proceeding.

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> "The second alternative, having the bankruptcy court decide the entire controversy, is less than satisfactory. The claimant is interested in recovering damages from the other respondents, not from the debtor. They in turn are insured or financially responsible and will want to present a full and thoroughgoing defense. Anything less than a plenary trial would be unfair to these other parties. In that case, the debtor would be caught up in exactly the same kind of trial as he would be before the panel. It is difficult to see how this would reduce his expense of defending."

7 Bankr. Ct. Dec. at 1220 (emphasis supplied). Here, of course, the equitable considerations which the Terry court found to be dispositive are present to a vastly greater degree.

An additional factor minimizing the prejudice to the Manville estate is that Manville has substantial liability insurance coverage. Although the insurers currently dispute the extent of such coverage, a judicial determination delineating the insurers' responsibility may well result in the insurers' taking over Manville's defense in the asbestos lawsuits. Where the debtor is insured, it is proper to lift the automatic stay to the extent of allowing proceedings to continue against the debtor asserting liability as to which he is covered. Johnson v. Terry, supra at 1220; Jessie v. Honosky, 7 Bankr. Ct. Dec. (CRR) 50, 52 (M.D. Fla. 1980) (The stay was lifted to allow plaintiff in personal injury action to "proceed with her suit . . . to the extent of the Debtor's insurance coverage").

This Court's decision in Named Plaintiffs and the Certified Classes They Represent in the Cement Antitrust

Litigation v. Penn-Dixie Industries, 6 B.R. 832 (Bankr. S.D.N.Y. 1980), is clearly distinguishable. In that case, this Court, in denying an antitrust plaintiff's motion for relief from the stay in order to conduct discovery against the debtor, observed:

> "Plaintiffs' requested relief from the automatic stay does not ask for permission to proceed in full with their antitrust suit. . . . [G]ranting Plaintiffs' request would not be a final, or even penultimate, step towards the resolution of Plaintiffs' claims. Plaintiffs' instant thrust is but a preludial tussle between the parties that is impermissible."

6 B.R. at 836-837.

In contrast, allowing the asbestos lawsuits to proceed against Manville where they were brought would result in the final resolution and liquidation of these claims, which represent Manville's largest liability and the primary reason for its Chapter 11 filing. Indeed, bankruptcy courts have held that the purposes of the Code are fostered by allowing the liquidation of claims for damages against the debtor to proceed in the tribunals in which they were originally brought. Brodsky v. Philadelphia Athletic Club, Inc., 9 B.R. 280 (E.D. Pa. 1981); S.F. Shopping News, Inc. v. Palmer Construction Co., Inc., 7 B.R. 232 (D.S.D. 1980).

In Philadelphia Athletic Club, the Bankruptcy Court granted relief from the stay to allow a claim for commissions allegedly owed to plaintiff by the debtor to proceed in state court, observing:

> "We . . . conclude that it will be in the best interests of all parties concerned to modify the stay to permit the state court action, now almost concluded, to proceed to a conclusion. At the present, the state court plaintiff has only an unliquidated claim against the debtor. That claim must be liquidated in order for the debtor's case under Chapter 11 to proceed. The question is what will be the most expeditious and fair way to liquidate that claim. In the instant case there have already been lengthy proceedings in the state court. To require the state court plaintiff to start those proceedings all over again in this court will clearly be a waste of judicial and legal time and effort. Since the state court action is almost at an end, the most expeditious way to liquidate the claim of the plaintiff is to permit the state court action to be concluded. This will cause the least delay and expense for all concerned."

9 B.R. at 282 (emphasis supplied).

Similarly, in Palmer Construction, the court allowed a negligence action to proceed against the debtor in state court, noting:

> "Presently, Plaintiff has only an unliquidated claim for damages that Debtor's negligence allegedly caused. Requiring Plaintiff to file a Proof of Claim will not settle the issues of what the amount of Plaintiff's damages are or whether the insurance company is liable, and if liable, how the insurance proceeds should be applied. Further, Debtor apparently has no equity in the insurance proceeds if the insurance company should be held liable for Plaintiff's claim for damages."

7 B.R. at 233. These principles apply to the Manville case.

CONCLUSION

In sum, the principles of law, equity and judicial economy require the unified resolution of all claims asserted against Manville in the asbestos litigation. Accordingly,

REDACTED

Section 362(a) should be applied to stay all asbestos litigation, at least for the present. If not, the automatic stay should be modified to permit the asbestos litigation to proceed with Manville's full participation.

Dated: October 28, 1982

Respectfully Submitted,

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EXHIBIT B

10-29-82

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE	:	
JOHNS-MANVILLE CORP., et al.,	:	Reorganization Nos. 82 B 11656
Debtors.	:	through 82 B 11676 Inclusive
GAF CORPORATION, KEENE CORPORATION, ARMSTRONG WORLD INDUSTRIES, INC., H.K. PORTER COMPANY, INC., PITTSBURGH CORNING CORPORATION, GARLOCK, INC., EAGLE-PICHER INDUSTRIES, INC., THE CELOTEX CORPORATION, and FIBREBOARD CORPORATION, on behalf of themselves and the Unofficial Committee of Asbestos Case Co-Defendants,	:	Adversary No. 82-6221
Plaintiffs,	:	
-against-	:	
JOHNS-MANVILLE CORPORATION, et al.,	:	
Defendants.	:	

PLAINTIFFS' STATEMENT UNDER SOUTHERN DISTRICT CIVIL RULE 3(g) IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs GAF Corporation, Keene Corporation, Armstrong World Industries, Inc., H.K. Porter Company, Inc., Garlock, Inc., Eagle-Picher Industries, Inc., The Celotex Corporation and Fibreboard Corporation, for their statement, pursuant to Rule 3(g) of the Civil Rules of the United States District Court for the Southern District of New York, of the material facts as to which

their is no genuine issue to be tried on Plaintiffs' motion for summary judgment, respectfully represent:

1. On August 26, 1982, Johns-Manville Corporation and twenty of its subsidiaries or affiliates (collectively, Manville or "Debtors") filed with this Court petitions for reorganization under title 11, Chapter 11, United States Code (the "Bankruptcy Code"). The Debtors continue to operate their businesses and manage their properties as debtors-in-possession under Sections 1107 and 1108 of the Bankruptcy Code.

2. Manville is a diversified manufacturing, mining and forest products company, conducting its business through five principal operating subsidiaries. Manville is the world's largest miner, processor, manufacturer and supplier of asbestos and asbestos-containing products.

3. Manville is a defendant or co-defendant in over 11,000 asbestos-related personal injury and property damage suits (the "asbestos litigation" or "asbestos lawsuits") brought by more than 15,550 plaintiffs* throughout the United States. Suits are pending in 46 states. Some court systems have more than 2000 asbestos lawsuits presently pending. An average of 425 new asbestos lawsuits per month were brought against Manville pre-petition and it estimates that approximately 32,000 additional suits could be brought against it in the next twenty-seven years.

---

* Plaintiffs in the underlying asbestos litigation will be referred to as "claimants" or "plaintiffs." The plaintiffs in this adversary proceeding and the class they represent will be referred to as "Co-Defendants."

4. Manville's current cost for the suits is estimated at approximately $40,000 per case, including defense expenses, but excluding cases on appeal. Since 1981 Manville has been found liable for punitive damages in several asbestos lawsuits and anticipates additional exemplary damage claims which greatly increase its potential liabilities. A study commissioned by Manville estimates that its potential liability in the asbestos litigation will be not less than $2 billion over the next twenty years. These enormous actual and potential liabilities faced by Manville in the asbestos litigation were the principal reason for the Chapter 11 filings.

5. In addition to its litigation with the plaintiffs, Manville is engaged in litigation with its insurance carriers in respect of its coverage for the claims asserted against it in the asbestos litigation. Johns-Manville Corporation v. The Home Insurance Company, No. 765226 (Cal. Sup. Ct., San Francisco Co.). Manville's insurance carriers have to this point largely disclaimed coverage and have refused to conduct the defense of, or to indemnif Manville from its liability in the asbestos lawsuits.

6. The asbestos litigation arises out of extensive use of thermal insulation products containing asbestos in the construction industry and shipyards. There was an increase in the use of this insulation starting with shipbuilding in World War II and the construction boom following the war. In 1965 Dr. Irving Selikoff, Chief of Mt. Sinai's Environmental Medicine Program, published a study called "The Occurrence of Asbestosis

Among Insulation Workers in the United States." Dr. Selikoff's study of the asbestos workers' union indicated that some insulation workers were contracting a disease called asbestosis. Subsequent to Dr. Selikoff's study, warnings were placed on thermal insulation products containing asbestos and attempts were made to find a substitute for asbestos.

7. By 1972, some substitutes had been found for asbestos in some thermal insulation products and other thermal insulation products for which no asbestos substitute could be found were discontinued. Asbestos continued to be used in other areas.

8. There are two types of asbestos lawsuits: (1) personal injury lawsuits by persons who claim they are suffering from an asbestos related disease and (2) property damage lawsuits in which the plaintiff claims injury to his property because of the presence of asbestos. The typical suit pleads strict liability, negligence (including failure to warn) and breach of warranty. Some suits contain conspiracy allegations and some seek punitive damages. Punitive damages are generally actively pursued against companies such as Manville which are claimed to have had early knowledge of asbestos related diseases and to have done nothing to prevent injury to the public.

9. There are approximately 11,000 lawsuits pending nationwide against various defendants in both state and federal courts. More than half of these cases arise out of the shipyards and there are large concentrations of cases in coastal states

such as Pennsylvania, Mississippi, Louisiana, Texas and California.

10. The personal injury cases are usually brought by insulators, members of the asbestos workers' union, and by members of allied trades such as welders or painters; a few claim to have been exposed to asbestos by the fibers brought home on the clothes of the worker, so-called household exposures or laundry cases. Property damage cases have primarily been brought by school districts.

11. Parties named as defendants in the asbestos litigation include participants at every level of the chain of distribution of asbestos-containing thermal insulation products: asbestos fiber miners, fabricators of raw asbestos, manufacturers of asbestos-containing thermal insulation products, distributors of such products, insulation contracting companies, and life and casualty insurance carriers, who have at one time or another provided insurance coverage for one or more of the foregoing companies.

12. For decades the United States Government was a supplier, specifier, consumer and promoter of asbestos products. Thousands of claimants in the asbestos litigation have alleged injurious exposure to asbestos dust while working in shipyards owned by or under contract to the U.S. Navy. The claimants allege that the Government knew of the potential hazards from asbestos exposure as early as the 1930s yet made little or no effort to educate its workers or to institute adequate workplace practices.

13. In recent years it has been found that significant and repeated exposure to asbestos, usually over relatively long periods of time, can cause injury or disease. These injuries or diseases (e.g., asbestosis and mesothelioma), may not appear until 20 to 40 years after initial exposure. Asbestosis is a scarring of the lung which gradually restricts the capacity of the lung to function. Mesothelioma is a malignant tumor of the lining of the lung or the stomach cavity.

14. In the late 1960's and early 1970's a few asbestos lawsuits were brought against some asbestos mining companies such as Manville and manufacturers of thermal insulation products containing asbestos. Starting in 1976 the number of asbestos cases grew exponentially. There were approximately 42 cases pending as of January 1, 1976; by August 1982, over 11,000 cases had been filed against various defendants.

15. Manville, due to its preeminent position in the asbestos industry is the principal defendant and the most important party in virtually all of the asbestos lawsuits. Manville as miner, processor, manufacturer and supplier enjoys the largest market share in the asbestos industry. Manville has been the principal contributor toward settlments and judgments in the asbestos lawsuits, and taken the "lead" position among the defendants in acting as custodian of documents, furnishing witnesses and securing expert testimony for all defendants. Manville's counsel has been the chief spokesman for the defense, coordinating and presenting the evidence on behalf of all co-defendants and

assuming the principal role in settlement negotiations. Manville is possessed of the expertise, documentary evidence and witnesses essential to the trial of the actions.

16. Over 200 companies other than Manville have been named as defendants in one or more asbestos cases. Manville has regularly impleaded the Co-Defendants in actions where the plaintiffs themselves did not name them as parties. Approximately ten to twenty co-defendants, including Manville, are present in most of the suits. In many instances, Manville was the supplier of the raw asbestos fiber to these entities.

17. In many cases, the plaintiffs have asserted that the co-defendants are jointly and severally liable. The Co-Defendants have claims for contribution and indemnity against Manville many of which have been asserted in cross-claims and separate actions.

18. Because of the multiplicity of defendants in the asbestos lawsuits, apportionment of liability among them is necessary for a determination in any given suit. Manville, as the principal supplier of asbestos fiber and the manufacturer of asbestos-containing products, is necessary for apportionment of liability as well as for determination of the liability, if any, of other defendants. The facts regarding Manville are essential to the trial of all of the asbestos lawsuits.

19. Immediately after the Manville Chapter 11 filing,, individual plaintiffs and defendants other than Manville applied to hundreds of judges in state and federal courts throughout the

country, before whom the asbestos lawsuits are pending, for adjournments, stays, severances, protective orders and the like.

20. Some courts in which the asbestos litigation is pending have stayed the litigation as to all parties by reason of the automatic stay under 11 U.S.C. §362(a); other courts have stayed the litigation as to all the parties for a limited period of time pending clarification from this Court; still other courts have only stayed the litigation as to Manville, severing Manville and allowing the other parties to proceed with discovery and trial; many courts have as yet to rule on the matter.

21. In the event the asbestos litigation proceeds without Manville the following will occur:

(a) Considerable time, effort and expense will be incurred in the piecemeal trial of selected asbestos lawsuits on the part of Manville witnesses and personnel despite the automatic stay, since Manville is the repository of evidence essential to plaintiffs and Co-Defendants.

(b) Virtually all plaintiffs in the asbestos lawsuits were predominantly exposed to asbestos and thermal insulation products containing asbestos manufactured and sold by Manville; if Manville is severed from the asbestos lawsuits, their claims for alleged asbestos-related injuries will have to be tried twice.

(c) No realistic settlement possibility will exist because Manville has paid the largest share of prior settlements, usually contributing from 10% to 50% of the entire amount.

(d) The Co-Defendants may be unable to secure documents and witnesses for trial to help exculpate themselves; exposure to Manville's products and Manville's responsibility for claimants' alleged injuries are inextricably intertwined with claimants' claims against the Co-Defendants who remain in the cases after the severance of Manville.

(e) Cross-claims and third-party claims which have been asserted by and against Manville cannot be presented to a court without its presence at trial, thereby necessitating duplicative trials on the issues of contribution and indemnification.

(f) Manville has coordinated defense efforts on behalf of all of the co-defendants and has retained experts and witnesses for trial in many jurisdictions with Manville's attorneys often serving as lead trial counsel; these functions will have to be duplicated.

(g) Manville's counsel has acted as custodian of voluminous defense records and documents in most jurisdictions; these functions will have to be duplicated.

Dated: New York, New York
October 29, 1982

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NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

ANDERSON RUSSELL KILL & OLICK, P.C.

Attorneys for

Office and Post Office Address

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NEW YORK, NEW YORK 10017

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on 19

at M.

Dated,

Yours, etc.,

ANDERSON RUSSELL KILL & OLICK, P.C.

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To

Attorney(s) for

Reorganization Nos. 82 B 11656-76 (BRL)
Index No. Inclusive Year 19
Adversary No. 82-6221
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re
JOHNS-MANVILLE CORP., et al.,
Debtors.

GAF CORPORATION, et al.,
Plaintiffs,

-against-

JOHNS-MANVILLE CORPORATION, et al.,
Defendants.

PLAINTIFFS' STATEMENT UNDER SOUTHERN DISTRICT CIVIL RULE 3(g) IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ Affidavit of Service By Mail On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

.....
The name signed must be printed beneath

EXHIBIT C

MEALEY'S™
Asbestos Bankruptcy Report

The Effrontery Of The Asbestos Trust Transparency Legislation Efforts

by
Elihu Inselbuch
Ann McMillan
and
Andrew Sackett

Caplin & Drysdale, Chartered
Washington, D.C.

A commentary article reprinted from the February 2013 issue of Mealey's Asbestos Bankruptcy Report

LexisNexis®

MEALEY'S Asbestos Bankruptcy Report Vol. 12, #7 February 2013

Commentary

The Effrontery Of The Asbestos Trust Transparency Legislation Efforts

By
Elihu Inselbuch
Ann McMillan
and
Andrew Sackett

[Editor's Note: Elihu Inselbuch, and Ann McMillan are members of and Andrew Sackett is a senior associate at Caplin & Drysdale Chartered, in Washington, D.C.

For more than eighty years corporations that produced and distributed asbestos-containing products — and their insurance companies — have attempted to avoid responsibility for the deaths and injuries of millions of American workers and consumers caused by those products. Since before 1930, they have hidden the dangers of asbestos and lied about their knowledge of those dangers, lobbied to make it harder for workers to sue for their injuries, fought to weaken protective legislation, and to this day continue to deny responsibility. Most recently, these asbestos litigation defendants have created a myth of plaintiff wrongdoing — which they call "double-dipping" — as a pretext for so-called settlement trust "transparency" legislation. This is not what it pretends to be — an effort to make the tort system more responsive — but merely their latest affirmative effort to evade responsibility for their own malfeasance.

It is a fundamental principle of American law that an injured person can recover damages from every entity that has harmed him, and as litigation progresses can settle his claim against one or another of the wrongdoers as he and they may agree. His compensation for his injury is, then, the sum of all the settlements reached. Only in the very rare case that goes to verdict, judgment, and payment (where the payment amount is reduced by an amount determined by the relevant state law to account for payments by settling co-defendants or bankruptcy trusts), is the victim's claim fully satisfied. Only if after verdict, judgment, and payment were a plaintiff to recover from a bankruptcy trust could he be overcompensated and be said to have "double-dipped." Out of the millions of trust claims filed and considered by trusts since 1988, defendants have identified just one case where a trust claim was filed by a plaintiff after judgment and paid by a trust. In that case the judgment was on appeal and had not yet been paid when the trust claim was filed. There is no "double-dipping" problem that needs to be fixed.

To fix this non-problem, front organizations for asbestos defendants have proposed "transparency" laws and regulations at both the federal and state levels. One such law was recently adopted in Ohio. While these proposals masquerade as mechanisms designed to advance evenhanded justice, they are, in fact, obvious efforts by asbestos litigation defendants to do an end-run around uniform rules of discovery in the tort system and reverse principles of tort law established hundreds of years ago, including the principle that the plaintiff is the master of his case and may choose which of multiple wrongdoers to sue and with which to settle.

These front organizations include the American Legislative Exchange Council ("**ALEC**") and the U.S. Chamber of Commerce Institute for Legal Reform. ALEC is funded by a variety of corporations, including those facing liability for injuries and deaths caused by their asbestos-containing products. ALEC is also

busy advancing the interests of the tobacco industry, health insurance companies, and private prisons — the latter particularly through legislation requiring expanded incarceration of immigrants. While ALEC purports to be a nonprofit, it is little more than a group of corporate lobbyists who write model legislation and then fund free trips for state legislators to luxury resorts, seeking to have them introduce model anti-civil justice legislation in their home legislatures.[1] Outrageously, ALEC is funded as a tax-exempt charity, although the IRS has recently received formal complaints challenging the group's nonprofit tax status on the basis that ALEC's primary purpose is to provide a vehicle for its corporate members to lobby state legislators and to deduct the costs of such efforts as charitable contributions.[2]

The supposed "transparency" sought by asbestos defendants is centered on claims plaintiffs make against trusts established to compensate asbestos victims. These asbestos personal injury trusts were created to resolve the bankruptcies of asbestos defendants overwhelmed by their provable tort liabilities to the people they injured. The trusts are crafted to distribute settlement payments to individuals injured by their bankrupt predecessors' products in amounts reflecting the historic tort system settlement share paid by the relevant predecessor. Because of the hopeless insolvency of their predecessors, the trusts are only able to pay a small percentage of that historical settlement share to each deserving claimant, present and future.

Supporters of these recent proposals claim that "transparency" is necessary to prevent "double-dipping" on the part of plaintiffs — that is, fraudulent multiple recoveries for the same injury, through lawsuits against remaining solvent defendants and trust claims. This assertion is deliberately misleading. Because of the ubiquitous presence of asbestos in industry, multiple companies are almost always at fault for asbestos-related diseases and deaths. Think of the shipyard worker, for example, assisting in the repair of countless U.S. Navy warships. The asbestos-containing products which were causes of his injury included boilers, pipe and thermal insulation, gaskets, and many others. A person so injured can legally recover from every company responsible, including both those he sues in the tort system and the trusts that stand in the shoes of bankrupt defendants. The current efforts by ALEC and its members are nothing more than an attempt to shift solvent defendants' share of responsibility to the insolvent defendants and leave the innocent victims with the resulting shortfall in recovery.

I. Tort System Asbestos Defendants And Their Insurers Come With Especially Unclean Hands

a. General Background — Asbestos Disease And Litigation

Asbestos is a naturally occurring mineral that was widely used during the twentieth century for industrial, commercial, and residential purposes.[3] Because of its tensile strength, flexibility, durability, and acid- and fire-resistant capacities, asbestos was used extensively in industrial settings and in a wide range of manufactured goods.[4] Diseases caused by exposure to asbestos kill thousands of Americans every year because asbestos is inherently dangerous. Whenever materials containing asbestos are damaged or disturbed, microscopic fibers become airborne, and can be inhaled into the lungs and cause disease.[5] The most serious asbestos-related disease is mesothelioma, a virulent cancer of the lining of the lungs that can be caused by even a short period of exposure, and is inevitably painfully fatal, often within months of diagnosis.[6] Other illnesses caused by asbestos include lung cancer, asbestosis, and pleural diseases.[7] The bulk of asbestos liabilities are for mesothelioma and other asbestos-related cancers.

Tens of millions of American workers have been exposed to asbestos; more than 27 million people were occupationally exposed between 1940 and 1979.[8] Millions of those exposed have fallen ill, or will fall ill in the future; many have died and many more will die as a result of their exposure. Manufacturers — but not workers — were for decades well aware of the significant health hazards posed by asbestos, but production and distribution of new asbestos-containing products continued virtually unabated until the 1970s,[9] and in some cases until 2000.[10] Asbestos diseases have long latency periods; a person exposed while working may not fall ill for forty years or fifty years, or even longer.[11] Thus, even though asbestos production and use has declined, the epidemic of asbestos-related illnesses is expected to continue for decades into the future.

By the early 1900s, medical scientists and researchers had uncovered "persuasive evidence of the health

hazards associated with asbestos."[12] Manufacturers and insurers knew this, and even as evidence mounted they continued to hide these findings and deny responsibility. In 1918, a Prudential Insurance Company report revealed excess deaths from pulmonary disease among asbestos workers, and noted that life insurance companies generally declined to cover asbestos workers because of the "assumed health-injurious conditions of the industry."[13] For decades, asbestos manufacturers were well aware of the dangers of asbestos, but did not protect their workers or the end-users of their products. In a thorough discussion of the history of asbestos use and litigation in the United States, District Judge Jack Weinstein noted:

> Reports concerning the occupational risks of asbestos, including the incidence of asbestosis and lung cancer among exposed workers, have been substantial in number and publicly available in medical, engineering, legal and general information publications since the early 1930s. There is compelling evidence that asbestos manufacturers and distributors who were aware of the growing knowledge of the dangers of asbestos sought to conceal this information from workers and the general public.[14]

As workers and others who had been exposed to asbestos began to get ill in large numbers, litigation began in the 1960s. Of particular importance was evidence uncovered by plaintiffs' attorneys — "[t]hrough persistence, vigorous discovery and creative efforts" — establishing that "manufacturers . . . knew that asbestos posed potentially life-threatening hazards and [chose] to keep that information from workers and others who might be exposed."[15] Angered by evidence that information about the dangers of asbestos had been suppressed, juries began awarding large punitive damages.[16] As a result of the plaintiffs' success in asbestos suits in the tort system, and the overwhelming number of claims, the point was reached long ago where most workers who fall ill from exposure to asbestos "recover substantial sums through settlement or jury awards."[17]

b. Evolution Of Filings In The Tort System

Asbestos personal injury litigation began in earnest in 1973 after the Fifth Circuit's decision in the benchmark case of *Borel v. Fibreboard Paper Products Corp*.[18] *Borel* established that manufacturers and distributors of asbestos products are liable to persons injured as a result of using their products because of their failure to warn regarding the danger of those products.[19] Recognizing that many persons have been exposed to a variety of asbestos products made by a large number of manufacturers, under circumstances that make it impossible to ascribe resulting disease to one particular product or exposure, the *Borel* court found that each and every exposure to asbestos could constitute a substantial contributing factor in causing asbestos diseases, and that each and every defendant who contributed to the plaintiff's aggregate asbestos exposure is legally responsible for the plaintiff's asbestos-related injuries.[20] The overwhelming majority of courts throughout the country have accepted the legal principles set out in *Borel*.[21]

With this development in the law, the thousands of people killed and maimed by exposure to asbestos and asbestos-containing products began to sue the manufacturers and distributors of those products. So many people had been injured or killed by asbestos that twenty-five thousand lawsuits were commenced in the next decade,[22] and the number of lawsuits continued to rise dramatically through the 1990s.[23]

c. Trust Formation

Epidemiology makes clear that thousands of people each year for decades to come will fall ill as a result of asbestos exposure, and experience teaches us that most will seek compensation from the manufacturers of the asbestos products that caused their injuries. Attempts to achieve settlements that would provide for the treatment and payment of these future claims are hampered by the difficulty of ensuring that any such settlement agreements would "provide for all future claimants who come forward, so that all who are eligible for compensation are properly compensated and all who are required to pay compensation have taken into account this responsibility in their business planning."[24] The overwhelming numbers of people who have been made sick and who are dead or dying from asbestos exposure and the large numbers of future claims have led dozens of asbestos manufacturers to choose bankruptcy to deal with these claims. Asbestos personal injury trusts were created during these bankruptcies to ensure that the tens of thousands of people who are currently sick and dying and the tens of thousands more who science tells us will sicken and die in the future as a result

of their asbestos exposure can receive some compensation for their injuries.

1. Manville

The Johns-Manville Corporation was the largest manufacturer and distributor of asbestos products in the twentieth century. Manville officers and directors knew of the dangers of asbestos since at least 1934, and kept this knowledge secret to prevent workers from learning that their exposure to asbestos could kill them. As evidence of Manville's responsibility became known, it was faced with tens of thousands of lawsuits, and, to deal with this liability, filed its Chapter 11 petition for reorganization in August of 1982.[25] To solve the problem of future claims, the Manville plan of reorganization pioneered the use of a trust dedicated to the resolution and payment of asbestos claims. The Manville Trust assumed the debtors' present and future asbestos liabilities, and all asbestos claims against the debtors (including those in the future) were directed to the Trust by an injunction — a "cornerstone" of the plan[26] — channeling all asbestos claims from the reorganized Manville Corporation to the Manville Trust. The channeling injunction was issued pursuant to the bankruptcy court's general equitable powers.[27]

2. Congress Acts

A substantial portion of the assets conveyed to the Manville Trust from which it would pay claims were equity and debt interests in the reorganized Manville Corporation, which, shorn of its asbestos liabilities, was a profitable forest products and industrial company. The public markets were skeptical about the validity of the channeling injunction, depressing the value of the Trust's holdings. To alleviate concerns about the *Manville* injunction, and to foster reorganization of asbestos debtors, in 1994 Congress enacted Bankruptcy Code Section 524(g), which statutorily validates the trust and channeling injunction mechanisms pioneered in the *Manville* case.[28] As Senator Brown explained, "[w]ithout a clear statement in the code of a court's authority to issue such injunctions, the financial markets tend to discount the securities of the reorganized debtor. This in turn diminishes the trust's assets and its resources to pay victims."[29]

Section 524(g) obviates due process concerns with respect to future claimants by providing for appointment of a legal representative to protect their interests.[30] The statute gives a debtor the right to propose and have confirmed a plan that will create a trust to which all of the debtor's present and future asbestos personal injury liabilities will be transferred, or channeled, for post-confirmation claims evaluation and resolution.[31] The debtor is freed of asbestos claims, in return for funding the trust, and present and future asbestos claimants have recourse to the assets of the trust.

There were not many other asbestos-driven bankruptcies of note in the 1990s — the largest was likely the bankruptcy of the Celotex Corporation and Carey Canada Incorporated (a subsidiary that had been engaged in the mining, milling, and processing of asbestos fiber), which filed for bankruptcy protection in 1990. The Celotex Asbestos Settlement Trust was formed in 1998.

This changed in the next decade, however. In 2000 there were sixteen asbestos personal injury trusts; by 2011, there were nearly sixty, with trusts formed by many large asbestos defendants, including Armstrong World Industries, the Babcock & Wilcox Company, Halliburton (Dresser Industries), Owens Corning, and United States Gypsum.[32]

3. Status Of Corporations Following Bankruptcies

ALEC and its members would like people to believe that the asbestos reorganizations have crippled businesses and put thousands out of work, suggesting that if the claims of victims are not somehow reduced, more corporate disasters will follow. Nothing could be further from the truth. Chapter 11 asbestos bankruptcies rarely result in lost jobs or diminished pensions. Instead, the Chapter 11 bankruptcy procedures allow a company to receive an "automatic stay," which stops all payments to creditors (including payments owed through settlements) and all pending lawsuits, and lets the company reorganize and then prioritize payments.[33]

Under Chapter 11 and section 524(g), therefore, a company can stop all pending asbestos lawsuits against it and set up a fund to settle all present and future asbestos claims. The automatic stay provision and the injunction available under section 524(g) can also extend to parent and subsidiary companies and protect them from future asbestos lawsuits derived from their affiliated debtor's torts.[34] This protection has enabled most companies that have sought

bankruptcy protection due to asbestos liabilities to recover and remain economically healthy. For example:

- Owens-Corning filed for bankruptcy protection in 2000, emerged from bankruptcy in 2006, and by 2011, it had sales of $5.3 billion and 15,000 employees in 28 countries on five continents.[35]
- The Babcock & Wilcox Company, which also sought bankruptcy protection in 2000 and confirmed a plan of reorganization in 2006, is now a company specializing in engineering, manufacturing and construction solutions in the renewable energy, clean coal, nuclear power and national security areas, employs approximately 12,000 people, as well as approximately 10,000 joint venture employees, and had 2011 revenues of almost $3 billion.[36]
- Halliburton, which formed the DII Industries, LLC, Asbestos PI Trust in 2004, when it emerged from bankruptcy protection, is "one of the world's largest providers of products and services to the energy industry," has more than 70,000 employees in roughly 80 countries, and had $25 billion in annual revenue in 2011.[37]
- Armstrong World Industries, Inc. is a global leader in the design and manufacture of floors, ceilings and cabinets. AWI exited bankruptcy protection in 2006, and by last year had consolidated net sales of approximately $2.9 billion and had approximately 9,300 employees worldwide.[38]
- Even Johns-Manville remains an active company. Owned by Berkshire Hathaway, it is a "leading manufacturer and marketer of . . . products for building insulation, mechanical insulation, commercial roofing, and roof insulation, as well as fibers and nonwovens for commercial, industrial and residential applications." It has annual sales of approximately $2.5 billion, "employs approximately 7,000 people and operates 45 manufacturing facilities in North America, Europe and China."[39]

II. Asbestos Trusts And Victim Compensation

According to the GAO, as of 2011 there were sixty asbestos personal injury trusts.[40] Most of these trusts work the same way. Pursuant to the mandate of 11 U.S.C. § 524(g), an asbestos trust must treat all similar claimants in substantially the same manner.[41] When it is formed, therefore, a trust will project the number of claims it expects to receive and determine the historic settlement value of those claims — what its predecessor would have paid to settle the claims had they been brought in the tort system.[42] The trust has fixed assets that will be insufficient to pay the full historic settlement value of all claims; it therefore sets a payment percentage, and each present and future claimant is paid the liquidated value of his or her claim discounted by the payment percentage.[43] The functioning of the trusts approximates the process through which lawsuits in the tort system are settled.

An asbestos trust is governed by a document containing a series of trust distribution procedures ("TDP"), approved by the bankruptcy court when confirming a plan of reorganization providing for creation of the trust.[44] The TDP sets forth procedures for the administration of the trust and establishes a process for assessing and paying valid claims. The TDP also includes the settlement amounts that the trust will offer a claimant with an asbestos-related disease who meets the exposure and medical criteria set out in the TDP, and thus can presumptively establish the trust's liability.[45] Claimants who believe that they are entitled to a larger payment from a trust because, for example, they have higher than normal damages, or manifested illness at an early age, can reject the standard settlement and seek "individual review" of their claims, which may or may not result in a higher settlement.[46] In either case, the trust is designed to value claims at the tort-system settlement share of its debtor — not the joint and several total value of the claim against all responsible parties that would be fixed by a jury.

For a claimant to recover from an asbestos trust, he or she must provide medical evidence demonstrating that the claimant has an asbestos-related disease, and evidence satisfactory to the trust that it has responsibility for the claimant's injuries.[47] The evidence required depends on the nature of the claimant's disease. A claimant with mesothelioma, for example, must provide a diagnosis of that disease by a physician who physically examined the claimant, or a diagnosis by a board-certified pathologist or a pathology report prepared at or on behalf of an accredited hospital, as

well as appropriate evidence of product identification as noted above.[48]

These criteria are combined with audit programs to ensure that the trusts do not pay fraudulent claims.[49] The trusts do not pay every claim that is filed, but routinely reject those that are deficient.[50] And while there is no guaranteed method to completely prevent attempts to abuse the trust system, there is simply no evidence that such practices are widespread. Moreover, the simple fact that a claimant sues a solvent defendant while filing claims against (and potentially receiving payment from) multiple trusts is not significant. Most asbestos victims were exposed to asbestos-containing products from multiple defendants and, unless there is an adjudication of liability and award and payment of damages, each defendant or trust remains responsible.

The asbestos personal injury trusts replace insolvent defendants, and are a settlement vehicle. The trusts are not tort defendants; rather, they settle claims created by the liability of their insolvent predecessors. Unlike solvent defendants, a trust does not contest liability when a plaintiff proves exposure to products for which the trust is liable.

Given the fact that the trusts pay a percentage of the settlement value of a claim, the amounts being paid to claimants vary widely from trust to trust, but are low compared to results in the tort system. The GAO survey found the median payment percentage across trusts is 25%.[51] The scheduled values for a claim, which reflect each defendant's historical settlement averages, vary widely as well, reflecting the share of total settlements paid by each defendant in the tort system. The following table shows some of these results.

As shown, the trusts do not have the funds to pay the full scheduled value to all present and future claimants, and most recoveries are quite small. For example, recovering from all of the trusts listed above would yield a claimant roughly $155,000, a very small portion of the damages routinely awarded by juries to mesothelioma victims.

III. Asbestos Trust Transparency Legislation — Unnecessary And Unfair

a. Background

Asbestos defendants and insurance companies, under the guise of creating increased "transparency," are introducing proposed legislation around the country to grant solvent asbestos defendants new rights and advantages to be used against asbestos victims in court. Some of these bills would also burden the asbestos trusts with unnecessary reporting requirements, slowing their ability to pay claims, and further draining them of the resources needed to make their already diminished payments. In general, the bills are an attempt to change the rules of the tort system to provide defendants with an advantage, using the existence of the trusts and claims of a lack of "transparency" as a subterfuge.

The "tort reform" community began attacking asbestos plaintiffs through the asbestos bankruptcy trust system in 2005, when Victor Schwartz and Mark Behrens coauthored a law review article claiming there was rampant fraud in the system.[53] While no systemic fraud has ever been found, more papers were published by these authors and others. The U.S. Chamber Institute for Legal Reform released a report criticizing asbestos litigation in Madison County, Ill., and submitted a proposed new bankruptcy rule to

TABLE 1 — Sample Trust Recoveries[52]

Trust	Payment %	Scheduled Value — Mesothelioma	Paid to Claimant
AWI	20%	$110,000	$22,000
Burns & Roe	25%	$60,000	$15,000
B&W	7.5%	$90,000	$6,750
Fibreboard	7.6%	$135,000	$10,260
Kaiser	35%	$70,000	$24,500
Manville	7.5%	$350,000	$26,250
OC	8.8%	$215,000	$18,920
USG	20%	$155,000	$31,000

"reform" the trust system to the Judicial Conference (the rule was rejected).[54] These so-called studies were also used to support proposed federal action on the asbestos bankruptcy trust system, which included the "Furthering Asbestos Claim Transparency (FACT) Act of 2012," which was introduced in the U.S. House of Representatives. In addition, ALEC drafted the "Asbestos Claims Transparency Act," which has been introduced in some state legislatures.[55]

Before analyzing these bills, it is helpful to understand how the tort system works on the ground. This understanding makes the flaws in and underlying motivations for the bills easier to see.

1. The Tort System And State Laws Are Functioning Properly

Asbestos victims are usually exposed to asbestos from the products of many manufacturers. In the tort system, a plaintiff is entitled to recover from any defendant whose products were a "substantial contributing factor" to his illness or injury.[56] Accordingly, plaintiffs often sue numerous defendants, and can assert claims against, and recover from, multiple asbestos trusts. The litigation and the trust resolutions usually proceed side-by-side.

The so-called problem of "double-dipping," therefore, as defined by the proponents of trust transparency, does not exist. When an asbestos victim recovers from each defendant whose product contributed to his or her disease, that victim is not "double-dipping," but recovering a portion of his or her damages from each of the corporations that caused the harm. In the case of asbestos litigation, some of those defendants will be held responsible through the tort system and others, now insolvent, will address their responsibility through the operation of their trusts. Until there is a paid jury verdict, a plaintiff's claim is not satisfied.

In the tort system, if a party wants to assign liability for wrongdoing to another, it has to prove that liability – that is, it bears the burden of proof. The plaintiff has the burden of proof only against defendants it sues. And if a defendant believes another entity such as a bankrupt is also at fault, and this matters to that defendant in the way the verdict might be apportioned, that defendant has the freedom to assert and the burden to prove this additional alleged fault.

2. Liability Regimes And Insolvent Defendants

States have different tort liability regimes, a situation not caused by or related to the existence of asbestos trusts. The principal difference between so-called several-only and joint-and- several jurisdictions is whether the plaintiff or defendant bears the risk of another responsible tortfeasor's inability to pay. An individual defendant's share of the liability for an injury is its "several" liability. In states that apply several-only liability rules, when a responsible defendant cannot pay, the plaintiff cannot recover that defendant's liability share from co-defendants; the plaintiff bears the loss.[57] With joint-and-several liability, each defendant the jury finds at fault can be required to pay the entire judgment and then seek contribution from others jointly responsible, whether another tort system defendant or a trust, bearing the risk that one or more of those jointly responsible cannot pay. The nature of each state's regime is a public policy choice of its legislature.

Underlying all of these systems is the fact that each defendant is assigned a share of liability. When verdicts are molded, courts typically reduce the verdict amount before entering judgment so as to reflect settlement payments a plaintiff has recovered from other tort system defendants and trusts.[58]

b. Defendants Have Created A Fictional Narrative In Which The Existence Of Trusts Is Somehow Unfair To Them And Requires A Legislative Solution

In recent bankruptcy filings, such as the Garlock case, and in sweeping statements that purport to justify the need for trust "transparency" defendants have created a narrative in which the existence of trusts is somehow unfair to them while presenting asbestos victims with an opportunity to commit fraud. Repeatedly invoking *one* case[59] (out of hundreds of thousands of asbestos claims filed) and the fact that asbestos victims seek compensation from solvent defendants in the tort system and insolvent defendants through the trusts they formed, asbestos defendants have justified these legislative initiatives on the grounds that this may somehow "result in businesses . . . being unfairly penalized and deprived of their rights."[60]

1. Federal Legislation — The FACT Act

An example of one such bill on the federal level was last year's H.R. 4369, the misleadingly-named "Furthering Asbestos Claim Transparency (FACT)

Act of 2012." The "FACT Act" would have forced trusts to report publicly highly private, individual claimant data. This would have included "the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant."[61] In addition, it would have required the trusts to "provide in a timely manner any information related to payment from, and demands for payment from, such trust, subject to appropriate protective orders, to any party to any action in law or equity if the subject of such action concerns liability for asbestos exposure."[62] Section 3 of the bill made the bill's provisions retroactive so that a trust would have had to report on every claim it had ever paid.[63] Asbestos trusts have paid more than 2.4 million claims since 1988; in 2010 alone asbestos trusts paid more than 461,000 claims.[64] This bill would have hobbled the trusts in order to provide defendants with information that, in the aggregate, they had no right to, and which they could get when needed on a case-by-case basis (albeit at their own expense) through normal everyday discovery in the tort system.

This bill has not been enacted. However, asbestos defendants and their allies, under the purview of organizations such as ALEC, are attempting to pass equally troublesome legislation at the state level. So far, the proponents have not sought disclosure of the same information (or "transparency") from their co-defendants in the tort system.

2. State Efforts — Ohio Asbestos Claims Transparency Act

In Ohio, the legislature recently enacted Ohio H.B. 380 (originally drafted by ALEC), which shifts control of key elements of the plaintiff's case to defendants while simultaneously shifting significant burdens to the plaintiff. This new Ohio law requires plaintiffs to identify all trust claims and material pertaining to those claims, and update those identifications when new claims are made.[65] Defendants can delay trial and force plaintiffs to make claims against other trusts.[66] Then, trust claims are presumed to be relevant and discoverable and can be introduced to prove causation and allocate responsibility.[67]

By forcing plaintiffs to make all trust claims and turn over that information, then making it presumptively admissible and relevant, the new Ohio law shifts the burden for a defendant seeking to claim that another party is liable from that defendant to the plaintiff. While not all judges will admit the trust claim information, when one does allow a jury to see the claims (which may or may not provide proof of exposure) the jury may well assign fault to the insolvent defendants.

Responsibility for liability between joint tortfeasors in Ohio is limited; unless a tortfeasor is more than 50% liable it will not have to pay the several share of other entities which were allocated responsibility.[68] Under the circumstances created by the new Ohio law, it is less likely that a guilty tortfeasor — already found liable of causing the injury and maybe death of the plaintiff — will have to bear the risk of its co-defendants' insolvency; instead, an innocent asbestos victim will not be able to recover fair compensation.

So, in addition to delay — which is always helpful to defendants — a defendant can force the plaintiff to file trust claims, even with limited information. The defendant can use those filed claims as evidence that the plaintiff was exposed to other sources of asbestos — *even if the trusts deny the claims* — and potentially reduce the defendant's share of liability.[69] And, as Ohio has a hybrid system of liability, even if each trust claim reduces a defendant's liability incrementally, the defendant can limit the plaintiff's recovery by at least those amounts and, if its liability falls below 50%, significantly.

Whether a solvent defendant found liable for a victim's injuries is liable for the shares of other tortfeasors is a question of public policy. So if a state's legislature wants to have open debate and change a fundamental rule of public policy, it can, of course, do so. Trust "transparency" subverts that process. Rather than making an informed decision, the Ohio legislature has changed public policy under the guise of so-called transparency, on the basis of largely anecdotal and unproven allegations only for asbestos plaintiffs. It is an effort to facilitate the defense against asbestos claims by forcing plaintiffs to assist in the defendant's efforts to shift responsibility to other entities.

3. Defendants Could Utilize Discovery To Obtain The Information They Seek, But Do Not

The pretextual nature of these bills is particularly clear when one considers that the information that "transparency" legislation seeks to make public is already available to defendants who need it. Asbestos personal injury litigation has been going on for more than thirty years. Many of the same lawyers are still

involved; those that represent defendants have witnessed all the discovery that plaintiffs — hundreds of thousands of plaintiffs — have produced, and have been at the trials. It is highly likely that there are very few job sites for which defendants do not have a library of data demonstrating which other defendants' products were present.

Often, this information does not come from plaintiffs. An individual plaintiff rarely knows what corporation provided the asbestos products present at a site where he worked. He is usually a sick or dying worker, or the widow of such a person, and he (or his widow) will only know where he worked and the kinds of materials he worked with, though not necessarily the materials his co-workers worked with. Proof of the identity of the supplier of the asbestos at those locations usually comes through discovery of suppliers and sales records, and depositions of co-workers, not the plaintiffs' memories. And the evidence is widely available. Without it, plaintiffs' lawyers would not have proved liability so many times that corporations worth billions of dollars had to file for bankruptcy protection.

For defendants to claim that transparent claim filings would solve a problem, therefore, is false. Should a defendant wish to lay off liability on an absent insolvent tortfeasor, the tort system allows it to do so. In addition to their institutional knowledge, the remaining defendants in the tort system have the same discovery devices available to them as plaintiffs do, and can prove the fault of the absent insolvent tortfeasors as easily as plaintiffs originally could. Defendants can obtain, for example, the plaintiffs' work history, employer records, and depositions of the plaintiffs and co-workers to determine the asbestos-containing products to which the plaintiffs were exposed. Defendants can also consult the trusts' websites, which generally contain searchable lists of sites where the products for which the trusts have responsibility were concededly used, and which are easily compared to a plaintiff's work history.[70]

4. Defendants Are Trying To Change The Rules Of Litigation Without Admitting That Is Their Purpose

Under the rubric of arguing that "transparency" is necessary to prevent supposed fraud, defendants are trying to change the law to receive whatever benefit they can from the existence of the trusts. With a law like Ohio's H.B. 380, defendants shift their burden — to prove fault on the part of other entities — to plaintiffs, while simultaneously lessening plaintiffs' control of their own lawsuits. The plaintiff now has to make claims at a defendant's behest, and then produce claims forms and supporting materials to that defendant, who may be able to use it to get insolvent entities on the verdict sheet. This reduces both the work required by the defendant to acquire evidence and the amount of that evidence it needs to limit its liability. It has nothing to do with reducing fraud; instead, it is a gift to the asbestos industry, which continues to try and avoid accountability and decrease compensation to the victims of its past wrongs — wrongs that it successfully hid for decades, causing years of unwitting worker exposure.

IV. Conclusions

Laws that seek to enforce disclosure and regulate the timing of trust claims, such as Ohio H.B. 380, are unjust and unfair to asbestos victims. These laws are not designed — or intended — to address fraud in the trust system. Indeed, there is not a scintilla of evidence of any such problem. The real purpose of these laws is to allow solvent defendants to take advantage of the bankruptcies of their co-tortfeasors by shifting to plaintiffs the burdens of the shortfalls caused by the bankruptcies, as well as the burdens of discovery and proof of the bankrupt tortfeasors' responsibility. These laws are simply the latest stratagem by corporations that produced and distributed asbestos-containing products to avoid responsibility for the deaths and injuries of millions of Americans caused by those products. Legislators should not allow public policy to be hijacked by special interests, and should be vigilant to protect the rights of injured workers and their families.

Endnotes

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9. *See In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 737-38 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993) ("**Manville I**").

10. *See* Enpro Industries Inc. Form 10-K (Mar. 3, 2009) at 84.

11. Muriel L. Newhouse & Hilda Thompson, *Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area*, 22 British Journal of Industrial Medicine 261, 265 (1965) (latency period can be as long as 55 years); C. Bianchi et al., *Latency Periods In Asbestos-Related Mesothelioma of the Pleura*, 6 European Journal of Cancer Prevention 162, 162 (1997) (the latency period in one case was 72 years).

12. *Manville I*, 129 B.R. at 737.

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14. *Manville I*, 129 B.R. at 737-38 (internal citation omitted). *See also id*. at 739 (noting that reports of mesothelioma among asbestos workers had emerged in journals of industrial medicine and hygiene in the late-1940's).

15. *Id.* at 743 (citing Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (1985) ("**Brodeur**").

16. *Id*. at 745-46.

17. *Id*. at 749.

18. *Borel v. Fibreboard Paper Prods. Corp*, 493 F.2d 1076 (5th Cir. 1973).

19. *Seeid*. at 1089.

20. *See id*. at 1095.

21. *See, e.g.*, *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1214 (Cal. 1997) (plaintiff may meet the burden of proving exposure to defendant's product caused lung cancer by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's risk of developing cancer); *Jones v. John Crane, Inc.*, 350 Cal. Rptr. 3d 144, 151 (Ct. App. 2005) ("The testimony

of the experts provided substantial evidence that Jones's lung cancer was caused by cumulative exposure, with each of many separate exposures having constituted substantial factors contributing to his risk of injury."); *John Crane, Inc. v. Linkus*, 988 A.2d 511, 531 (Md. Ct. Spec. App. 2010) ("We conclude that lay testimony describing the amount of dust created by handling the products in question, coupled with expert testimony describing the dose response relationship and the lack of a safe threshold of exposure (above ambient air levels), was sufficient to create a jury question [as to whether the plaintiff's mesothelioma was caused by defendant's asbestos-containing products]."); *John Crane, Inc. v. Wommack*, 489 S.E.2d 527, 532 (Ga. Ct. App. 1997) ("Expert testimony showed that it is universally agreed that asbestos fibers are intrinsically dangerous and that the respiration of each fiber is cumulatively harmful . . . ."); *Blancha v. Keene Corp.*, Civ. A. No. 87-6443, 1991 WL 224573, at *6 (E.D. Pa. Oct. 24, 1991) (*every* occupational exposure to asbestos "is a substantial factor in bringing about mesothelioma"); *Held v. Avondale Indus., Inc.*, 672 So. 2d 1106, 1109 (La. Ct. App. 1996) (medical evidence showed "no known level of asbestos [exposure] which would be considered safe . . . any [asbestos] exposure, even slight exposures, to asbestos . . . [found to be] a significant contributing cause of the [decedent's] malignant pleural mesothelioma"); *Mavroudis v. Pittsburgh-Corning Corp.*, 935 P.2d 684 (Wash. Ct. App. 1997) (any exposure to asbestos above background contributes to development of mesothelioma); *Kurak v. A.P. Green Refractories Co.*, 689 A.2d 757, 766 (N.J. Super. Ct. App. Div. 1997) ("Where there is competent evidence that one or a *de minimis* number of asbestos fibers can cause injury, a jury may conclude the fibers were a substantial factor in causing a plaintiff's injury."); *ACandS, Inc. v. Abate*, 710 A.2d 944, 989 (Md. Ct. Spec. App. 1998), *abrogated by*, *John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002) (expert medical witness testified that "each and every [asbestos] exposure that [the decedent] had was a substantial contributing factor in the causation of his disease"); *Caruolo v. ACandS, Inc.*, No. 93 Civ. 3752 9RWS, 1999 WL 147740, at *9 (S.D.N.Y. Mar. 18, 1999) *aff'd in part*, *vacated in part*, 226 F.3d 46 (2d Cir. 2000) (expert medical witness testimony that "[T]here is no way one can say [each asbestos exposure] didn't contribute. To the contrary. All of his exposures contributed to his mesothelioma, including this one.").

22. Brodeur at 73.

23. Jennifer L. Biggs et al., American Academy of Actuaries, *Overview of Asbestos Claims Issues and Trends*, Mass Tort Subcommittee at 3 (Aug. 2007) *available at* http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf.

24. Stephen J. Carroll et al., RAND Institute for Civil Justice, *Asbestos Litigation* 46 (2005) ("**RAND Asbestos Litigation Study**").

25. *See In re Johns-Manville Corp.*, 68 B.R. 618, 620 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd*, 843 F.2d 636 (2d Cir. 1988).

26. *See id.* at 624.

27. *See id.*

28. *See, e.g.*, *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 235 n.47 (3d. Cir. 2004). *See also* H.R. Rep. No. 103-835 at 3 (1994) (explaining that Section 524(g) is intended to emulate the "creative solution to help protect the future asbestos claimants, in the form of a trust into which would be placed stock of the emerging debtor company and a portion of future profits, along with contributions from [the debtor's] insurers" devised in the *Manville* case). Section 524(h), which was enacted at the same time, makes clear that the channeling injunction in *Manville* is deemed retroactively to comply with Section 524(g), and thus is valid.

29. Bankruptcy Amendments Act of 1993, Amendment No. 1633, 140th Cong. (2d Sess. 1994) (*amending* 11 U.S.C. § 524).

30. *See* 11 U.S.C. § 524(g)(4)(B)(i).

31. *See id.*

32. GAO Report at 3.

33. *See* 11 U.S.C. § 362(a)(1); 2 William L. Norton, Jr. & William L. Norton, III, *Norton Bankruptcy Law & Practice* § 43:5 (3d ed 2012); 5 William L.

Norton, Jr. & William L. Norton, III, *Norton Bankruptcy Law & Practice* § 91:1 (3d ed. 2012).

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35. *SeeInvestor Relations Home*, OwensCorning.com, http://investor.owenscorning.com (last visited Jan. 4, 2013).

36. *SeeCorporate Profile*, The Babcock & Wilcox Company, http://phx.corporate-ir.net/phoenix.zhtml?c=236851&p=irol-IRHome (last visited Jan. 4, 2013); Babcock & Wilcox Company Form 10-K at 38, filed Feb. 29, 2012.

37. *SeeCorporate Profile*, Halliburton.com, http://www.halliburton.com/AboutUs/default.aspx?navid=966&pageid=2458 (last visited Jan. 4, 2012).

38. *SeeOverview*, Corporate Profile, Armstrong World Industries, Inc., http://phx.corporate-ir.net/phoenix.zhtml?c=98651&p=irol-IRHome (last visited Jan. 4, 2012).

39. *SeeAbout Us*, JM.com, http://www.jm.com/corporate/263.htm (last visited Jan. 4, 2012).

40. GAO Report at 3. This number may not be accurate, as some trusts are dormant and other bankruptcy cases which were expected to lead to new trusts are still active.

41. *See* 11 U.S.C. § 524(g)(2)(B)(i)(III).

42. *See, e.g.*, *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 722 (D. Del. 2005); *see also* United States Gypsum Asbestos Personal Injury Settlement Trust, Trust Distribution Procedures §§ 2.3, 4.2 (revised Mar 29, 2010), http://www.usgasbestostrust.com/files/USGTDP.pdf ("**USG TDP**").

43. *See* USG TDP §§ 2.3 and 4.2; see also *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 114, 136 (D. Del. 2006).

44. *See, e.g.*, *In re Burns & Roe Enters., Inc.*, 08-4191 (GEB), 2009 WL 438694, at *32, *37 (D.N.J. Feb. 23, 2009).

45. *See, e.g.*, USG TDP § 5.3(a).

46. *See, e.g.*, *id.* § 5.3(b).

47. *See, e.g.*, *id.* §§ 5.3(a)(3); 5.7(a), (b).

48. *See, e.g.*, *id*.

49. GAO Report at 29.

50. GAO Report at 19.

51. GAO Report at 21.

52. *See* Manville Personal Injury Settlement Trust, *2002 Trust Distribution Process* § D (Jan. 2012 Revision), http://www.claimsres.com/documents/MT/2002%20TDPJanuary%202012%20 Revision.pdf; Manville Personal Injury Settlement Trust, *FAQs* § A.2 (Mar. 2012), http://www.claimsres.com/documents/MT/FAQS.pdf; *Amended and Restated Armstrong World Industries, Inc. Asbestos Personal Industry Settlement Trust Distribution Procedures* § 5.3(b)(4), armstrongworldasbestostrust.com (updated July 14, 2010), http://www.armstrongworld asbestostrust.com/files/Conformed%20AWI%20TDP%20as%20of%207_14_10.PDF; *Frequently Asked Questions*, armstrongworldasbestos trust.com, http://www.armstrongworldasbestostrust. com/page_25.asp (last visited Jan. 4, 2012); *Asbestos PI Settlement Trust Distribution Procedures* § 5.3(b)(3), bwasbestostrust.com (revised Oct. 27, 2011), http://www.bwasbestostrust.com/files/ B%20W %20CLEAN %20TDP%2010_27_11%20P 0219676.pdf; *Frequently Asked Questions*, bwasbes tostrust.com, http://www.bwasbestostrust.com/page_25.asp (last visited Jan. 4, 2012); *Third Amended Trust Distribution Procedures* § 5.3(b)(3), kaiserasbestostrust.com (Nov. 20, 2007), http://www.kaiser asbestostrust.com/Files/Third%20Amended%20Trust%20Distribution%20 Procedures%2000013238.pdf; *Notice of Payment Percentage Adjustment*, kaiserasbestostrust.com (May 13, 2011), http://www. kaiserasbestostrust.com /Files/20110513_KACC_Payment_Percentage_Notice.pdf; *Trust Distribution Procedures* §§ 2.3, 5.3(b)(4), burnsandroetrust.com (Nov. 10, 2008), http://www. burnsandroetrust.com/Files/20081110_BurnsAndRoe_TDP.PDF; *Owens Corning/Fibreboard Asbestos Personal Injury Trust Distribution Procedures* (Revised Feb. 2, 2010) § 5.3(b)(4); http://www.ocfbasbestostrust.com/faq_popup.asp?fid=38 (last visited Feb. 13, 2013); *United States Gypsum Asbestos Personal Injury Settlement Trust*

Distribution Procedures (Revised March 29, 2010) § 5.3(b)(3); http://www.usgasbestostrust.com/faq_popup.asp?fid=40 (last visited Feb. 13, 2013).

53. Victor E. Schwartz et al., *Defining the Edge of Tort Law in Asbestos Bankruptcies: Addressing Claims Filed by the Non-Sick*, 14 J. Bankr. L. & Prac. 61 (2005).

54. *See* James L. Stengel, U.S. Chamber Inst. For Legal Reform, *Litigating in the Field of Dreams: Asbestos Cases in Madison County, Illinois*, (Oct. 2010), *available at* http://www.instituteforlegalreform.com/sites/default/files/asbestoscasesinmadisoncountyillinois.pdf; Letter from Lisa A. Rickard, U.S. Chamber Inst. for Legal Reform, to Peter G. McCabe, Sec'y of Comm. on Rules of Practice & Procedure, Judicial Conference of the U.S. (Nov. 22, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK%20Suggestions%202010/10-BK-H-Suggestion-Rickard.pdf.

55. The Asbestos Claims Transparency Act has been introduced in Louisiana, Ohio, Oklahoma, Texas, and West Virginia. H.B. 477, 2012 Leg., 38th Reg. Sess. (La. 2012); Amended Substitute H.B. 380, 129th Gen. Assem., 2012 Sess. (Ohio 2012); S.B. 1792, 53d Leg., 2d Reg. Sess. (Okla. 2011); H.B. 2034, 82d Leg. (Tex. 2011); S.B. 1202, 82d Leg. (Tex. 2011); S.B. 43 & 56, 80th Leg., Reg. Sess. (W.Va. 2011). The Ohio bill is the only one to have been enacted and is discussed later in this paper.

56. *See* supra notes 18-21 and accompanying text.

57. *See Bondex Int'l v. Ott*, 774 N.E.2d 82, 86-87 (Ind. Ct. App. 2002); *State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.*, 172 P.3d 410, 413 (Ariz. 2007).

58. *See* Paul D. Kheingold, *Litigating Mass Tort Cases* § 10:65 (2012).

59. *Kananian v. Lorillard Tobacco Co.*, No. CV 442750 (Ct. Com. Pl., Cuyahoga Cnty. Ohio, 2001).

60. Amended Substitute H.B. 380 § 4(G).

61. Furthering Asbestos Claim Transparency (FACT) Act of 2012, H.R. 4369, 112th Cong. § 2(8)(A)(i) (2012).

62. *Id.* § 2(8)(B).

63. *Id.* § 3(b).

64. GAO Report at 16-17.

65. Amended Substitute H.B. 380 § 1 (amending § 2307.952(A)(1)(a)).

66. *Id.* (amending § 2307.953(A)).

67. *Id.* (amending § 2307.954(B)).

68. Ohio Rev. Code Ann. § 2307.22(A)(1) (West 2013).

69. Amended Substitute H.B. No. 380 § 4(I).

70. *See, e.g.*, *USG Approved Site List*, usgasbestostrust.com (updated June 7, 2012), http://www.usgasbestostrust.com/files/USG%20Site%20List%206-7-12.xls. ■

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EXHIBIT D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	
ARMSTRONG WORLD INDUSTRIES,	)	Chapter 11
INC., et al.,	)	Case No. 00-04471 RJN
	)	
Debtors.	)	

United States District Court
866 King Street - Second Floor
Wilmington, Delaware

Tuesday, November 18, 2003
9:00 a.m.

BEFORE: THE HONORABLE RANDALL J. NEWSOME
United States District Judge

APPEARANCES:

STEPHEN KAROTKIN, ESQ.
and DEBRA A. DANDENEAU, ESQ.
WEIL, GOTSHAL & MANGES, LP
for Debtors

ELIHU INSELBUCH, ESQ.
and PETER VAN M. LOCKWOOD, ESQ.
CAPLIN & DRYSDALE CHARTERED
for Personal Injury Committee

STEPHEN J. SHIMSHAK, ESQ.
and ANDREW N. ROSENBERG, ESQ.,
and ALAN ARFFA, ESQ.,
and ROBERTA KAPLAN, ESQ.,
for Official Committee of Unsecured
Creditors of AWI

her subsequent testimony on voir dire, that at least for the time being I will allow her to testify as an expert witness.

I, of course, always have the option to decide later that I was wrong that she isn't an expert as the rule outlines it.

MR. ARFFA: Just to clarify, Judge. Obviously we've been talking mostly because the voir dire was directed toward the asbestos claims estimation area. And we're also offering her as an expert in terms of the legislative process in asbestos litigation.

THE COURT: We talked about that yesterday. I give her affidavit, her declaration no weight. I don't think there is such a thing as a sear (phonetic) as far as legislation goes. I don't think anybody is an expert on that. I will listen very, very briefly to testimony in which you profer, but my patience on that issue is going to be very short. So I don't find her as an expert on that because I don't think there is any such thing.

MR. ARFFA: I would like to put it --

THE COURT: Sustained.

MR. ARFFA: Judge, I thought we had been through this and I thought what Your Honor had ruled --

THE COURT: We don't have a piece of legislation. It would be bad enough if she were testifying as to what the law contains. That everybody knows you can't do. But this is even worse. She is now going to tell me what a proposed piece of legislation contains which is not even a law yet. I think as we discussed --

MR. ARFFA: Judge --

THE COURT: Excuse me. As we discussed yesterday I think this is totally beyond the pale. I gave you the opportunity merely to allow her declaration into evidence or affidavit into evidence and leave it at that. But I am not going to sit here and listen to what a piece of proposed legislation contains that is not even close to being on the floor of the Senate or the House yet.

MR. ARFFA: Can I ask her at least what the current status is and what she believes to be the prospects for passage and why she